(1)

No. 98-7809-CSX Title: Salvador Martinez, Petitioner
v.
Court of Appeal of California, Fourth Appellate District

Docketed:
January 27, 1999 Court: Supreme Court of California

See also:
98-7501

Entry	Date	Proceedings and Orders
	Jan 15 1999	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due February 26, 1999)
	Feb 8 1999	Waiver of right of respondent Court of Appeal of California to respond filed.
	Feb 11 1999	DISTRIBUTED. February 26, 1999
	Feb 17 1999	Response requested.
	Mar 19 1999	Brief of respondent Court of Appeal of California, Fourth Appellate District in opposition filed.
	Apr 1 1999	REDISTRIBUTED. April 16, 1999
	Apr 5 1999	Reply brief of petitioner Salvador Martinez filed.
	Apr 19 1999	Petition GRANTED. limited to the following question: "Does a criminal defendant have a constitutional right to elect self-representation on direct appeal from a judgment of conviction?" SET FOR ARGUMENT November 9, 1999. **********
	May 4 1999	Motion of petitioner for appointment of counsel filed.
	May 10 1999	DISTRIBUTED. May 13, 1999. (Page 25)
	May 11 1999	Letter from counsel Cindi Mishkin received and distributed.
	May 12 1999	Letter from Appellate Defenders received and distributed
	May 17 1999	Motion for appointment of counsel GRANTED and it is ordered that Ronald B. Maines, Esquire, of Washington, D.C., is appointed to serve as counsel for the petitioner in this case.
	Jun 22 1999	Order extending time to file brief of petitioner on the merits until July 15, 1999.
	Jul 1 1999	Motion of National Association of Criminal Defense Lawyers for leave to file a brief as amicus curiae filed.
	Jul 13 1999	Order further extending time to file petitioner's brief on the merits to and including July 30, 1999.
	Jul 29 1999	Order further extending time to file petitioner's brief on the merits to and including August 6, 1999.
	Aug 6 1999	Joint appendix filed.
	Aug 6 1999	Brief of petitioner Salvador Martinez filed.
	Sep 7 1999	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Sep 8 1999	Brief of respondent Court of Appeal of California filed.
	Sep 14 1999	Brief and appendix of petitioner pro se received. (NP)
	Sep 20 1999	Record filed.
	Sep 21 1999	CIRCULATED.

2 PP

No. 98-7809-CSX

Entry	Date	Proceedings and Orders
	Oct 6 1999	Application (99A286) to extend the time to file a reply brief from October 8, 1999 to October 11, 1999, submitted to Justice O'Connor.
	Oct 6 1999	Application (99A286) granted by Justice O'Connor extending the time to file until October 11, 1999.
	Oct 12 1999	Reply brief of petitioner Salvador Martinez filed.
	Oct 21 1999	LODGING consisting of lower court opinion submitted by counsel for the petitioner received and distributed.
	Oct 27 1999	Record filed.
	Nov 9 1999	ARGUED.

Supreme Court, U.S.
FILED
JAN 15 1999
OFFICE OF THE CLERK

No. 98-7809 (2)

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

SALVADOR MARTINEZ — PETITIONER
(Your Name)

RECEIVED
JAN 15 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

VS.

STATE OF CALIFORNIA, ET. AL — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[ ] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

⋈ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Salvador Martinez
(Signature)

20 pp

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, SALVADOR MARTINEZ, am the petitioner in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ___ No ✓

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes ___ No ✓

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or have a checking or savings account? Yes ___ No ✓

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes ___ No ✓

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on: Jan. 11, 1999.

Salvador Martinez
(Signature)

CC APPEAL-4TH DIST. DIV. 3
FILED
OCT 16 1998

Deputy Clerk

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SALVADOR MARTINEZ, Defendant and Appellant.	G024042 (Super. Ct. No. 98CF1062) ORDER

Appellant's motion to represent himself on appeal is DENIED. (*In re Walker* (1976) 56 Cal.App.3d 225.)

SILLS, P.J.
SILLS, P.J.

"A"

S074348

IN THE SUPREME COURT OF CALIFORNIA

SALVADOR MARTINEZ, Petitioner

v.

FOURTH APPELLATE DISTRICT DIVISION THREE, Respondent

THE PEOPLE, Real Party In Interest

SUPREME COURT
FILED
NOV 18 1998
Robert Wandruff Clerk
DEPUTY

Application for stay and petition for writ of mandate/prohibition DENIED.

George
Chief Justice

"B"

do. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SALVADOR MARTINEZ — PETITIONER
(Your Name)

VS.

STATE OF CALIFORNIA — RESPONDENT(S)

PROOF OF SERVICE

I SALVADOR MARTINEZ, do swear or declare that on this date, ~~DECEMBER 7~~ _____, 19 98, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

SUPREME COURT OF CALIFORNIA - 303 SECOND ST. - SAN FRANCISCO, CA.

4TH APPELLATE DISTRICT, DIVISION THREE - 925 SPURGEON - SANTA ANA, CA.

CAL. ATTORNEY ~~GENERAL~~ GENERAL -300 S. SPRING -L.A., CA.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JAN. 11, 1999

Salvador Martinez
(Signature)

AFFIDAVIT OF SERVICE BY MA ORIGINAL

Attorney:	No. 98-7809 October Term, 1998
DANIEL E. LUNGREN Attorney General of the State of California ROBERT M. FOSTER Supervising Deputy Attorney General	**SALVADOR MARTINEZ,** Petitioner, v.
110 West A Street, Suite 1100 P. O. Box 85266 San Diego, California 92186-5266	**COURT OF APPEAL OF CALIFORNIA,** Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego, in which County the below-stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100, San Diego, California 92101.

I have served the within **BRIEF OF RESPONDENT IN OPPOSITION** as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and eleven (11) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

CINDI B. MISHKIN
STAFF ATTORNEY
APPELLATE DEFENDERS, INC.
233 A STREET, SUITE 1200
SAN DIEGO, CA 92101

SALVADOR MARTINEZ, P10344
CALIFORNIA CORRECTIONAL FACILITY
44750 60TH STREET WEST (D2-210)
LANCASTER, CA 93536

ANTHONY J. RACKAUCKAS
DISTRICT ATTORNEY
700 CIVIL CENTER DRIVE WEST
ROOM 200
SANTA ANA, CA 92701
(COURTESY COPY)

HONORABLE DANIEL J. DIDIER, JUDGE
% ORANGE COUNTY SUPERIOR COURT
CRIMINAL OPERATIONS BUREAU
P. O. BOX 22024
SANTA ANA CA 92702-2024
(COURTESY COPY)

APPELLATE DEFENDERS, INC.
233 A STREET, SUITE 1200
SAN DIEGO, CA 92101
(COURTESY COPY)

STEPHEN M. KELLY, CLERK
CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION THREE
925 NORTH SPURGEON STREET
SANTA ANA, CA 92701-3709

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the eighteenth day of March, 1999.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, March 18, 1999.

RECEIVED
MAR 19 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Brenda J. Modkins
BRENDA J. MODKINS

No. 98-7809

Supreme Court, U.S.
FILED
JAN 15 1999
OFFICE OF THE CLERK

IN THE ORIGINAL

SUPREME COURT OF THE UNITED STATES

SALVADOR MARTINEZ — PETITIONER
(Your Name)

VS.

STATE OF CALIFORNIA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SUPREME COURT OF THE STATE OF CALIFORNIA
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

RECEIVED
JAN 15 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI

SALVADOR MARTINEZ - CDC NO. P-10344
(Your Name) CAL. STATE PRISON - LAC
44750 60th STREET WEST
(Address)
LANCASTER, CALIFORNIA 93536
(City, State, Zip Code)

(Phone Number)

98-7809
Martinez
v.
Court of Appeal
of CA

QUESTION PRESENTED

DOES THE CLEARLY ESTABLISHED SIXTH AMENDMENT RIGHT TO SELF REPRESENTATION AT TRIAL, BY A DEFENDANT, AS ANNOUNCED BY THIS COURT IN FARETTA V. CALIFORNIA, 45 L. Ed. 2d 562, 95 S.Ct. 2525, APPLY TO SELF REPRESENTATION ON APPEAL BY AN APPELLANT?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

COURT OF APPEAL, STATE OF CALIFORNIA
FORTH COURT OF APPEAL, DIVISION THREE

STATE OF CALIFORNIA ATTORNEY GENERAL

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APPENDIX B SUPREME COURT OF CALIFORNIA ORDER DENYING SELF REPRESENTATION RIGHT ON APPEAL.

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CONSTITUTION:

SIXTH AMENDMENT 9-15

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix ____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix ____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

⋈ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A & B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
⋈ is unpublished.

The opinion of the _____ court appears at Appendix ____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. A-_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

⋈ For cases from **state courts**:

The date on which the highest state court decided my case was 11/18/98. A copy of that decision appears at Appendix B.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. A-_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUT. AL AND STATUTORY PROVISIONS VOLVED

SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL, RIGHT TO SELF REPRESENTATION.

BEST AVAILABLE COPY

STATEMENT OF THE CASE

PETITIONER IS THE APPELLANT IN THE PENDING APPEAL BEFORE THE COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT, DIVISION THREE OF THE STATE OF CALIFORNIA, STYLED PEOPLE V. SALVADOR MARTINEZ, APPEAL, NO. G024042. THE CURRENT APPEAL RESULTED FROM A CONVICTION FROM THE SUPERIOR COURT OF ORANGE COUNTY, STATE OF CALIFORNIA, IN CASE NO. 98-CF-1062, FOR VIOLATING CAL. PENAL CODE 503, FOR THE OFFENSE OF EMBEZZLEMENT, ONE COUNT, AND UNDER THE 'THREE STRIKES' LAW SEC. 667, B-I. PETITIONER WAS ALLOWED TO REPRESENT HIMSELF AT TRIAL BEFORE THE ENTIRE CRIMINAL PROCEEDING. SAID REPRESENTATION WAS PURSUANT TO FARETTA V. CALIFORNIA, 95 S.CT. 2525 AT ALL CRIMINAL PROCEEDINGS. PETITIONER FILED HIS TIMELY PRO-SE NOTICE OF APPEAL.

ON SEPTEMBER 27TH, 1998, PETITIONER FILED HIS MOTION FOR SELF REPRESENTATION AND HIS WAIVER OF RIGHT TO COUNSEL FOR THE PURPOSE OF REPRESENTING HIMSELF ON APPEAL WITH THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE. PETITIONER PROVIDED AN 'UNEQUIVOCAL' ASSERTION TO THE COURT OF APPEAL OF HIS SIXTH AMENDMENT RIGHT TO REPRESENT HIMSELF ON APPEAL PURSUANT TO THIS COURT'S DECISION IN FARETTA V. CALIFORNIA, SUPRA, AND TWO NINTH CIRCUIT COURT APPEAL DECISIONS, E.G., HENDRICKS V. ZENON, 993 F. 2D 664,669 (9TH CIR. 1993) AND MOORE V. CALDERON, 108 F.3D 261 (9 TH CIR. 1996). PETITIONER FURTHER PROVIDED THE APPEALS COURT WITH A "WAIVER OF RIGHT TO COUNSEL ON APPEAL". HENDRICKS V. ZENON, SUPRA.

ON OCTOBER 16TH, 1998, THE FOURTH APPELLATE DISTRICT, (DENIED) "APPELLANT'S MOTION TO REPRESENT HIMSELF ON APPEAL" AND CITED IN RE WALKER (1976) 56 CAL. APP. 3D 225, FOR ITS DENIAL. SEE COPY OF ORDER BY PRESEDING JUDGE SILLS, APPENDIX A. THE FIFTH APPELLATE DISTRICT OF CALIFORNIA IN WALKER, SUPRA, HELD.."THAT A CRIMINAL DEFENDANT HAS NO RIGHT UNDER THE U.S. CONSTITUTION OF SELF-REPRESENTAION ON APPEAL". THE WALKER COURT BASED REASONING BECAUSE..."the FARETTA COURT DID NOT HAVE BEFORE IT ANY CLAIM OF A RIGHT TO SELF-REPRESENTATION ON APPEAL". ID. AT 228-229.

STATEMENT OF THE CASE CONTINUED:

ON OCTOBER 20TH, 1998, PETITIONER PETITIONED THE SUPREME COURT OF CALIFORNIA BY WAY OF (HIS) PETITION FOR WRIT OF PROHIBITION/MANDATE SEEKING TO RESOLVE THE ISSUE OF SELF-REPRESENTATION ON APPEAL UNDER THE RATION OF FARETTA, AND THE CONFLICT RAISED BETWEEN THE NINTH CIRCUIT COURT OF APPEAL DECISIONS AND OTHER APPELLATE COURTS DECISIONS CONFERRING THE SIXTH AMENDMENT RIGHT TO REPRESENT ONE-SELF ON APPEAL. SAID PETITION WAS FILED ON OCTOBER 27TH, 1998. ON NOVEMBER 18, 1998, THE SUPREME COURT OF CALIFORNIA (DENIED) PETITION. SEE ORDER, APPENDIX B.

PETITIONER HAS EXAUSTED STATE REMEDIES.

PETITIONER REQUEST THIS COURT TO RESOLVE THE CONFLICT RAISED AMONG THE APPELLATE COURTS AS TO WHETHER THE SIXTH AMENDMENT CONFERS THE RIGHT TO REPRESENT ONE-SELF ON APPEAL UNDER THE RATIONAL OF FARETTA.

REASON FOR GRANTING THE PETITION

TO RESOLVE THE CONFLICT AND CONTINURING SPLIT AMONG THE FEDERAL AND STATE COURTS AS TO WHETHER THE SIXTH AMENDMENT CONFERS THE RIGHT TO SELF REPRESENTATION ON "APPEAL" BASED ON THIS COURT'S DECISION IN FARETTA V. CALIFORNIA (1975) 95 S.CT. 2525. THERE ARE SEVERAL AUTHORITIES RECOGNIZING THE SIXTH AMENDMENT RUGHT, UNDER FARETTA, TO SELF REPRESENTATION ON APPEAL AND SEVERAL AUTHORITIES DECLINING TO EXTEND THE FARETTA RIGHT TO SELF REPRESENTATION ON APPEAL. PETITIONER WILL RESPECTFULLY CITE THE AUTHORITIES WHICH RECOGNIZE AND DECLINE RECOGNIZE THE SIXTH AMENDMENT RIGHT TO SELF REPRESENTATION ON APPEAL BASED ON THE RATIONAL SETOUT BY THIS COURT IN FARETTA V. CALIFORNIA, SUPRA.

A. AUTHORITIES RECOGNIZING THE RIGHT TO SELF REPRESENTATION ON APPEAL BASED ON FARETTA:

1. STATE COURTS:

THE INDIANA SUPREME COURT IN WEBB V. STATE (1980) 274 IND. 540, 412 N.E. 2D 790,792; THE MICHIGAN SUPREME COURT IN PEOPLE V. STEPHENS (1976) 71 MICH. APP. 33, 246 N.W. 2D 429,432; AND THE TEXAS COURT OF CRIMINAL APPEALS IN WEBB V. STATE (TEX. CRIM. APP. 1976) 533 S.W. 2D 780,783; HATHORN V. STATE, (TEX. CRIM. APP. 1992) 848 S.W. 2D 101, 122,123; HAVE ALL RECOGNIZED THE RIGHT TO SELF REPRESENTATION ON APPEAL (FINDING) "THE QUESTION OF WHETHER THE SIXTH AMENDMENT ALSO GUARANTEES SELF REPRESENTATION ON APPEAL HAS NOT BEEN PASSED BY THE UNITED STATES SUPREME COURT, BUT SINCE THE SIXTH AMENDMENT RIGHT TO COUNSEL IS APPLICABLE AT BOTH TRIAL AND APPEAL, DOUGLAS V. CALIFORNIA (1963) 376 U.S. 353, IT FOLLOWS THAT THERE IS A CORRELATIVE RIGHT TO REJECT COUNSEL AND PROCEED PRO-SE BOTH AT TRIAL AND ON APPEAL OF A CRIMINAL CASE. THERE IS NO MEANINGFUL DISTINCTION BETWEEN CONDUCTING A DEFENSE AT TRIAL AND PROSECUTING AN APPEAL THAT PREVENTS THE APPLICATION OF THE FARETTA RATIONALE TO THE CASE OF AN APPELLATE WHO WISHES TO REJECT REPRESENTATION BY COUNSEL AND INSTEAD REPRESENT HIMSELF ON APPEAL".

THE ARKANSAS SUPREME COURT, RELYING ON FARETTA, HELD A CRIMINAL APPELLANT PURSUING A FIRST APPEAL AS A MATTER OF RIGHT MAY AVAIL HIMSELF OR HERSELF OF THE RIGHT TO SELF REPRESENTATION UPON A VOLUNTARY AND INTELLIGENT WAIVER OF THE RIGHT TO COUNSEL. STATE V. VAN PELT (1991) 305 ARK. 125, 810 S.W. 2D 27,28; GIDRON V. STATE (1993) 312 ARK. 517, 850 S.W. 2D 331,332. THE PENNSYLVANIA SUPREME COURT, CITING, FARETTA AND PENNSYLVANIA AUTHORITY, HELD; "IT IS WELL STTLED THAT A CRIMINAL DEFENDANT OR APPELLANT HAS THE RIGHT TO PROCEED PRO SE AT TRIAL AND THROUGH APPELLATE PROCEEDING" COMM. V. ROGERS (1994) 537 PA. 581, 645 A. 2D 223, 224. A LOUISIANA APPELLATE COURT HELD..."A DEFENDANT'S RIGHT TO SELF REPRESENTATION EXTENDS TO HIS FIRST APPEAL". STATE V. WARNER (L. CT. APP. 1991) 594 SO. 2D 397,402. THE NEW MEXICO COURT OF APPEALS, STATE V. LEWIS (1986) 104 N.M. 218, 719N P. 2D 445,447, FOUND PERSUASIVE THE TEXAS DECISION IN WEBB V. STATE, SUPRA, 533 S.W. 2D 780, AND CONCLUDED.."AN ACCUSED HAS CONSTITUTIONAL RIGHT TO PROSECUTE HIS OWN APPEAL".

2. FEDERAL COURTS:

THE EIGHTH CIRCUIT IN CHAMBERLAIN V. ERICKSEN (8TH CIR. 1984) 744 F.2D 628,630 STATED: "IT IS NOT SETTLED WHETHER THE RIGHT OF SELF REPRESENTATION UNDER FARETTA EXTENDS TO A DEFENDANT'S APPEAL FROM A CONVICTION". CHAMBERLAIN OBSERVED "A DEFENDANT'S RIGHT TO FILE PRO SE BRIEF OR MOTIONS IS DISTINGUISABLE FROM A DEFENDANT'S RIGHT TO MAKE ORAL ARGUMENT BEFORE THE COURT. CITING PRICE V. JOHNSTON, 344 U.S. 266. CHAMBERLAIN CONCLUDED: "WE HAVE NO DOUBT THAT A DEFENDANT IS NOT REQUIRED TO HAVE COUNSEL FORCED UPON HIM OR HER. THIS RULE IS TRUE NOT ONLY AT TRIAL BUT ON APPEAL".

THE FIFTH CIRCUIT FOUND THE EIGHTH CIRCUIT'S REASONING IN CHAMBERLAIN PERSUAIVE. IN MYERS V. COLLINS (5th CIR. 1993) 8 F.3D 249,252, THE COURT HELD.."WHETHER AT TRIAL OR APPEAL, A DEFENDANT IS NOT REQUIRED TO ACCEPT UNWANTED COUNSEL...A STATE CRIMINAL DEFENDANT HAS A CONSTITUTIONAL RIGHT TO PRESENT PRO SE BRIEF AND MOTIONS ON APPEAL".

THE NINTH CIRCUIT COURT OF APPEALS IN CAMPBELL V. BLODGETT (9TH CIR 1991) 940 F. 2D 549 AND HENDRICKS V. ZENON (9TH CIR. 1993) 993 F.2D 664,669, HELD..."A DEFENDANT HAS SIXTH AMENDMENT RIGHT TO PROCEED PRO SE ON APPEAL, PURSUANT TO FARETTA".

A FEDERAL DISTRICT COURT IN THE SEVENTH CIRCUIT HELD THERE IS A SIXTH AMENDMENT RIGHT TO SELF REPRESENTATION ON APPEAL. U.S. V. EX REL. WILLIAMS V. O'LEARY (N.D. ILL. 1989) 712 F. SUPP. 662,665. THE DISTRICT COURT REASONED THAT..."TRIAL COUNSEL CANNOT BE FORCED ON AN UNWILLING DEFENDANT. FARETTA V. CALIFORNIA, 422 U.S. 806..ESTABLISHED THAT THE SIXTH AMENDMENT GUARANTEES A STATE CRIMINAL TRIAL DEFENDANT THE RIGHT TO SELF REPRSENTATION. THOUGH FARETTA DID NOT DIRECTLY ADDRESS THE SAME QUESTION AT THE APPELLATE LEVEL, THE IDENTICAL CONSIDERATION STATED IN FAREATTA...WOULD SEEM TO APPLY AT THAT LATER STAGE,".

B. AUTHORITIES DECLINING TO EXTEND THE FARETTA RIGHT TO SELF REPRESENTATION TO THE APPEAL.

1. STATE COURTS;

THE NEVADA SUPREME COURT IN BLANDIO V. STATE (1996) HELD...."BECAUSE THE SIXTH AMENDMENT ONLY APPLIES TO TRIAL, IT DOES NOT SUPPORT E EXISTENCE OF A RIGHT TO SELF REPRESENTATION ON APPEAL". THE TENNESSEE COURT OF CRIMINAL APPEAL IN STATE V. GILLESPIE (TENN. CRIM. APP. 1994) 898 S.W.2D 738,741, HELD.."THE SIXTH AMENDMENT RIGHT TO PROCEED PRO SE...IS LIMITED TO TRIAL PROCEEDINGS...THERE IS NO CONSTITUTIONAL RIGHT TO APPEAL...THE RIGHT TO COUNSEL ON A FIRST TIER APPEAL, THEREFORE, DERIVES FROM NOTIONS OF EQUAL PROTECTION AND DUE PROCESS UNDER THE FOURTEENTH AMENDMENT".

IN CALLAHAN V. STATE (1976) 30 MD. APP. 628, 354 A.2D 191, 193, 194, THE MARYLAND APPELLATE COURT FOUND THE RIGHT TO ASSISTANCE OF COUNSEL AT TRIAL AND THE CORRELATIVE RIGHT TO SELF REPRESENTATION AT TRIAL, AS SET FORTH IN FARETTA, DID NOT ESTABLISH A RIGHT OF SELF RESENTATION ON APPEAL, DUE TO THE "DIFFERENT RULE WHICH APPLIES AT THE APPELLATE LEVEL". THE FLORIDA SUPREME COURT DETERMINED.."THE PRINCIPLE OF FARETTA...CONCERNING SELF REPRESENTATION IS NOT APPLICABLE TO APPEALS". HILL V. STATE (FLA. 1995) 656 SO.2D 1271,1272.

2. FEDERAL COURTS:

THE FOURT CIRCUIT COURT OF APPEALS IN U.S. V. GILLIS (4TH CIR. 1985) 773 F.2D 549, 559,560, HELD THERE IS NO CONSTITUTIONAL RIGHT TO SELF REPRESENTATION ON APPEAL. THE FOURTH CIRCUIT EXPLAINED.."IN CONSTITUTIONAL ANALYSIS, THE RIGHTS TO COUNSEL AND SELF REPRESENTATION ON APPEAL STAND ON DIFFERENT GROUND. UNLIKE, THE RIGHT TO TRIAL, WHICH IS ALSO GUARANTEED BY THE SIXTH AMENDMENT, THERE IS NO CONSTITUTIONAL RIGHT TO AN APPEAL. ALTHOUGH A CONVICTED DEFENDANT HAS A RIGHT TO COUNSEL ON APPEAL, HIS IMPLICIT SIXTH AMENDMENT RIGHT TO REPRESENT HIMSELF AT TRIAL DOES NOT CARRY OVER TO THE APPEAL".

THE SEVENTH CIRCUIT COURT OF APPEALS IN LUMBERT V. FINLEY (7TH CIR. 1984) 735 F.2D 239,246, REJECTED THE CONTENTION FARETTA STAND FOR THE PROPOSITION THE SIXTH AMENDMENT GUARANTEES A RIGHT TO SELF REPRESENTATION ON APPEAL.

PETITIONER WILL RESPECTFULLY SHOW THE MOST RECENT DECISION BY A CALIFORNIA APPELLATE COURT WHICH ALSO DECLINED TO EXTEND THE FARETTA RIGHT TO SELF REPRESENTATION ON APPEAL. THE SECOND APPELLATE DISTRICT, DIVISION THREE, IN PEOPLE V. SCOTT 64 CAL. APP. 4TH 550, 75 CAL. RPTR. 2D 315 (JUNE 1998), CONCLUDED, "THE SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL AT TRIAL, AND THE RELATED RIGHT TO CONDUCT ONE'S OWN DEFENSE, AS RECOGNIZED IN FARETTA, DO NOT GIVE RISE TO A RIGHT TO SELF REPRESENTATION ON APPEAL". A WORTHY NOTE IN PEOPLE V. SCOTT, SUPRA, PRESIDING JUDGE KLEIN STATED..."IN VIEW OF THE SUBSTANTIAL AND CONTINUING SPLIT AMONG THE FEDERAL COURTS AS TO WHETHER THE SIXTH AMENDMENT CONFERS A RIGHT TO SELF REPRESENTATION ON APPEAL, IT MAY BE APPROPRIATE FOR THE UNITED STATES SUPREME COURT TO RESOLVE THE ISSUE".

WHEREFORE, BASED ON THE CONFLICT RAISED AMONG THE APPELLATE COURTS ON THE SIXTH AMENDMENT RIGHT TO SELF REPRESENTATION ON APPEAL, PETITIONER PRAYS THAT THIS COURT GRANT THIS PETITION TO RESOLVE THAT CONFLICT.

CONCLUSION

BASED ON THE CONFLICT RAISED AMONG THE APPELLATE COURTS ON THE SIXTH AMENDMENT RIGHT TO SELF REPRESENTATION ON APPEAL, PETITIONER PRAYS THAT THIS COURT GRANT THIS PETITION TO RESOLVE THAT CONFLICT.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Salvador Martinez

Date: JANUARY 11, 1999

CALIFORNIA

ALL-PURPOSE

ACKNOWLEDGEMENT

STATE OF CALIFORNIA)

COUNTY OF San Diego)

On March 5, 2002 before me, Jeanne L. Ruiz Notary Public
DATE NAME, TITLE OF OFFICER - E.G., "JANE DOE, NOTARY PUBLIC"

personally appeared, Brenda J. Meakins

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Jeanne L. Ruiz (SEAL)
NOTARY PUBLIC SIGNATURE

JEANNE L. RUIZ
COMM. # 1194971
NOTARY PUBLIC-CALIFORNIA
SAN DIEGO COUNTY
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

SALVADOR MARTINEZ,

Petitioner,

v.

COURT OF APPEAL OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Does a criminal defendant have a federal constitutional right to elect self-representation in the direct appeal from the judgment of his conviction?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998
No. 98-7809

SALVADOR MARTINEZ,

Petitioner,

v.

COURT OF APPEAL OF CALIFORNIA,

Respondent.

STATEMENT OF THE CASE

Petitioner, who proceeded in pro se of his trial, was convicted by a jury of the fraudulent appropriation of the property of another in violation of California Penal Code section 503. The jury also found true that Petitioner had suffered three prior strike convictions within the meaning of California Penal Code sections 667(d), 667(e)(2), 1170.12(b), and 1170.12(c)(2). As a result, Petitioner's sentence for his new crime was twenty-five years to life in state prison.

On September 3, 1998, Petitioner filed a notice of appeal. On October 16, 1998, Petitioner's request to proceed in pro se was denied by the California Court of Appeal, Fourth Appellate District, Division Three. In doing so, the court cited to In re Walker, 56 Cal. App. 3d 225, 128 Cal. Rptr. 291 (1976).

On October 27, 1998, Petitioner filed a petition for writ of mandate with the California Supreme Court in case number S074340. On November 18, 1998, the petition was denied.

Petitioner filed his Petition for a Writ of Certiorari on December 29, 1998. On January 14, 1999, the California Court of Appeal, Fourth Appellate District, Division Three, granted Petitioner's request for a stay of his appeal pending the ruling by this Court on the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW IS CORRECT AND CALIFORNIA'S APPELLATE REVIEW PROCESS COMPLIES WITH THE DUE PROCESS AND EQUAL PROTECTION CLAUSES

California courts have consistently and properly ruled that a criminal appellant has no federal constitutional right to elect self-representation on appeal.[1] Scott, 64 Cal. App. 4th at 554; In re Walker, 56 Cal. App. 3d 225, 128 Cal. Rptr. 291 (1976).

The writ should be denied because the decision below was correct; California's appellate process comports with due process and equal protection, and the Constitution does not recognize a right to elect self-representation on appeal.

A. There Is No Constitutional Right To Elect Self-Representation On Appeal

There is nothing in the text of the Constitution which guarantees to a criminal defendant the right to elect self-representation on appeal.

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1. The California Supreme Court in People v. Massie, 19 Cal. 4th 550, 570, 967 P.2d 29, 42, 79 Cal. Rptr. 2d 816 (1998), citing to the decision in People v. Scott, 64 Cal. App. 4th 550, 554, 75 Cal. Rptr. 2d 315, 318 (1998), agreed that this Court's decision in Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), did not grant a constitutional right to elect self-representation on appeal.

1. The standards governing recognition of a fundamental right under the United States Constitution

This Court looks to the text of the Constitution, not the purported "importance" of the asserted right, when deciding whether an asserted right is "fundamental." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-35, 93 S. Ct. 1278, 1297-98, 36 L. Ed. 2d 16 (1973); see also, Vacco v. Quill, 521 U.S. 793, 799-800, 117 S. Ct. 2293, 2297, 138 L. Ed. 2d 834 (1997). "The Due Process Clause does not demand uniformity of procedure, each State is free to devise its own way of securing essential justice in these situations." Hysler v. State of Florida, 315 U.S. 411, 416-17, 62 S. Ct. 688, 691, 86 L. Ed. 932 (1942). Thus, states are "free to devise their own systems of review in criminal cases," the "[p]rocedural details for securing fairness" are left to the states, and the manner in which a state chooses to adjudicate claims is afforded wide discretion, "so long as they observe those ultimate dignities of man which the United States Constitution assures." Carter v. People of State of Illinois, 329 U.S. 173, 176, 67 S. Ct. 216, 219, 91 L. Ed. 172 (1946).

In determining whether a right is "fundamental," the Court has admonished courts not to take an "expansive view" of the "authority to discover new fundamental rights imbedded in the Due Process Clause," and has further admonished that there should be "great resistance to expand the substantive reach of

those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental." Bowers v. Hardwick, 478 U.S. 186, 194-95, 106 S. Ct. 2841, 2846, 92 L. Ed. 2d 140 (1986).

2. There is no constitutional right to an appeal

Over a century ago, this Court held that the Constitution does not require states to grant appeals as of right to criminal defendants seeking to review alleged trial court errors, and that the right of review in an appellate court is purely a matter of State concern. Kohl v. Lehlback, 160 U.S. 293, 299, 16 S. Ct. 304, 40 L. Ed. 432 (1895); McKane v. Durston, 153 U.S. 684, 687-88, 14 S. Ct. 913, 915, 38 L. Ed. 867, 868 (1894). "Indeed, for a century after the Court was established, no appeal as of right existed in criminal cases, and, as a result, appellate review of criminal convictions was rarely allowed." Abney v. United States, 431 U.S. 651, 656, 97 S. Ct. 2034, 2038, 52 L. Ed. 2d 651 (1977).

In the over 100 years since the Court's decision in McKane, this Court has never retreated from its holding that a criminal defendant has no constitutional right to an appeal, and that it is wholly within the discretion of the states whether to allow such a review. Johnson v. Fankell, 520 U.S. 911, 922-23, n.13, 117 S. Ct. 1800, 1807, n.13, 138 L. Ed. 2d 108 (1997); M.L.B. v. S.L.J., 519 U.S. 102, 110, 117 S. Ct. 555, 560, 136 L. Ed. 2d 473 (1996); Goeke v. Branch, 514 U.S.

115, 120, 115 S. Ct. 1275, 1278, 131 L. Ed. 2d 152 (1995); Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312, 77 L. Ed. 2d 987 (1983); Abney, 431 U.S. at 656; United States v. MacCollom, 426 U.S. 317, 323, 96 S. Ct. 2086, 2091, 48 L. Ed. 2d 666 (1976); Estelle v. Dorrough, 420 U.S. 534, 536-38, 95 S. Ct. 1173, 1175-76, 43 L. Ed. 2d 377 (1975) [per curiam]; Griffin v. Illinois, 351 U.S. 12, 18, 76 S. Ct. 585, 590, 100 L. Ed. 891 (1956).

3. A criminal defendant has no constitutional right to be present at or argue an appeal

In Price v. Johnston, 334 U.S. 266, 285, 68 S. Ct. 1049, 1060, 92 L. Ed. 1356 (1948), this Court held a criminal defendant has no constitutional right to be present at or argue his appeal, and "sharp[ly] contrast[ed]" this with the constitutional right to be "present in person at each significant stage of a felony prosecution, and to his recognized privilege of conducting his own defense at the trial." Indeed, while this Court in Faretta recognized a criminal defendant's right to represent himself at trial under the Sixth and Fourteenth Amendments to the Constitution, the Court specifically distinguished the federal constitutional nature of defendant's right to conduct his own defense at the trial level from other appellate stages of the judicial process. Faretta, 422 U.S. at 816.

That a criminal defendant has no constitutional right to be present at or argue his appeal significantly contrasts with the constitutional right to be present during all critical stages of trial, Kentucky v. Stincer, 482 U.S. 730, 744, 107 S. Ct. 2658, 2667, 96 L. Ed. 2d 631 (1987); Rushen v. Spain, 464 U.S. 114, 117, 104 S. Ct. 453, 455, 78 L. Ed. 2d 267 (1983); Faretta, 422 U.S. at 820, n.15; Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 332, 78 L. Ed. 674 (1934), and the constitutional right to present his own testimony at trial, Rock v. Arkansas, 483 U.S. 44, 51-53, 107 S. Ct. 2704, 2708-09, 97 L. Ed. 2d 37 (1987); Nix v. Whiteside, 475 U.S. 157, 164, 106 S. Ct. 988, 993, 89 L. Ed. 2d 123 (1986); Brooks v. Tennessee, 406 U.S. 605, 612, 92 S. Ct. 1891, 1895, 32 L. Ed. 2d 358 (1972); Harris v. New York, 401 U.S. 222, 225, 91 S. Ct. 643, 645, 28 L. Ed. 2d 1 (1971); In re Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 507, 92 L. Ed. 682 (1948).

4. If a state grants appellate review, the due process and equal protection clauses -- not the Sixth Amendment -- grant the right to the effective assistance of appellate counsel

This Court's decisions demonstrate that the rights, remedies, and procedures granted a criminal defendant by a state's appellate review flow from the Fourteenth Amendment Due Process and Equal Protection Clauses, which demand the effective assistance of retained or appointed appellate

counsel. They do not derive from the Sixth Amendment, the foundation of Faretta.

In Griffin, the Court held that a transcript of the trial court proceedings must be provided to an indigent criminal appellant if that was the only way to ensure an "adequate and effective" appeal. Griffin, 351 U.S. at 13-14. In doing so, the Court recognized that while a state had no constitutional obligation to provide appellate review, if the state chose to create such a right, the Due Process and Equal Protection Clauses protected indigent criminals from "invidious discriminations." Id., at 18.

In 1963, this Court in Douglas v. California, 372 U.S. 353, 356-58, 83 S. Ct. 814, 816-17, 9 L. Ed. 2d 811 (1963), held that when a state in its discretion created a right to an appeal, it must provide counsel, basing such a right not on the Sixth Amendment, but on the Fourteenth Amendment, which required the state to make the appeal more than a "meaningless ritual" by supplying an indigent appellant with counsel. Id., at 358.

On the same day, this Court held that the right of an indigent defendant to counsel at trial flowed from the explicit grant of that specific right in the Sixth Amendment, made applicable to the states through the Due Process Clause of the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 339, 83 S. Ct. 792, 794, 9 L. Ed. 2d 799 (1963).

In Rinaldi v. Yeager, 384 U.S. 305, 310, 86 S. Ct. 1497, 1500, 16 L. Ed. 2d 577 (1966), this Court summarized the Griffin line of decisions and held, without reference to the Sixth Amendment, that while the Court had never held that the States are required to establish avenues of appellate review, these avenues once established, "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." Requiring counsel on first appeal does not impede this.

Indeed, subsequently, this Court held the appellate attorney appointed must be available to assist in preparing and submitting a brief to the appellate court, Swenson v. Bosler, 386 U.S. 258, 259, 87 S. Ct. 996, 997, 18 L. Ed. 2d 33 (1967), and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim, Entsminger v. Iowa, 386 U.S. 748, 750-51, 87 S. Ct. 1402, 1403, 18 L. Ed. 2d 501 (1967); Anders v. California, 386 U.S. 738, 743-45, 87 S. Ct. 1396, 1399-400, 18 L. Ed. 2d 493 (1967).

In Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974), this Court held that the states were left to decide whether to provide counsel to indigent state defendants in their discretionary appeals. In doing so, this Court acknowledged that the rationale for the Griffin and Douglas line of cases had "never been explicitly established" and that "some support" was found in both the Due Process and

Equal Protection Clauses. Ross, 417 U.S. at 608-09. This Court in Ross again recognized the critical differences between the trial and appellate stages. Id., at 610-11.

In the year following Moffitt, this Court in Faretta recognized a criminal defendant had a corollary fundamental constitutional right, flowing directly from the Sixth Amendment right to counsel at trial, to represent himself at trial without assistance of counsel. Faretta, 422 U.S. at 818-33. The recognition of this right in Faretta was "based on the long-standing recognition of a right of self-representation in federal and most state courts, and on the language, structure, and spirit of the Sixth Amendment." McKaskle v. Wiggins, 465 U.S. 168, 174, 104 S. Ct. 944, 978, 79 L. Ed. 2d 122 (1984).

In Jones, this Court held a criminal defendant had no constitutional right to have appellate counsel raise every nonfrivolous issue the defendant requests, and that it was appellate counsel, and not his client, who decided the issues to be presented, even over his client's objections. Jones, 463 U.S. at 751-54.

In Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985), this Court held a state could not penalize a criminal defendant by dismissing his first appeal as of right when appointed counsel failed to follow mandatory appellate rules, and that the right to appellate counsel meant the right to "effective assistance." Id., at 396.

Finally, in 1997, this Court in Johnson, once again repeated that prior decisions "made it quite clear that it is a matter for each State to decide how to structure its judicial system," and that respect for the fundamental principles of federalism is at its apex when the Court is confronted with a claim "that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts."[2] Johnson, 520 U.S. at 922-23, n.13.

5. **The justification for self-representation at trial cannot be easily applied to a criminal appeal**

The considerations and justifications for self-representation at trial do not lend themselves to a criminal appeal. At trial, unlike an appeal, the state's desire is to transform a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. In order to accomplish this purpose, the prosecuting attorney presents evidence and witnesses, cross-examines, contradicts and

2. In Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987), the Court declined to extend the right to appointed appellate counsel beyond the appointment of counsel to represent the criminal defendant in his first appeal as of right. In Austin v. United States, 513 U.S. 5, 6-8, 115 S. Ct. 380, 130 L. Ed. 2d 219 (1994), this Court held that the constitutional right of indigent defendants pursuing appeals as of right to a brief filed on their behalf by an attorney did not extend to forums for discretionary review, and an attorney may be relieved of the duty to file frivolous petitions.

challenges defense witnesses, challenges and argues rulings of the court, and directs arguments to both the court and jury in order to convince them of the defendant's guilt.

In contrast, it is generally the criminal defendant, rather than the state, who initiates the appellate process, seeking to overturn the court or jury's guilty verdict, rather than fending off the efforts of the state's prosecutor. The criminal defendant under these circumstances needs an appellate attorney not, as he does at trial, to shield him from being "hauled into court" by the state and stripped of his presumption of innocence, but instead as a "sword" to upset the prior determination of guilt. Ross, 417 U.S. at 611.

> This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all.

Id.

6. **A state's refusal to permit self-representation on appeal does not deny a criminal appellant due process or equal protection, and is reviewed under the rational basis standard**

This Court's decisions recognize that a criminal appellant's right to due process is protected only if he is represented by counsel in his appeal. However, these due process concerns are undermined, and not furthered, by

permitting the criminal appellant to elect self-representation.

In this regard, in both Faretta and Gideon, the right to counsel and self-representation at trial were based upon an historical and textual analysis of the Sixth Amendment, which commands, protects, and guarantees the right to counsel and self-representation at trial.

However, as stated above, a criminal defendant's right to the effective assistance of appointed or retained counsel on appeal, announced by this Court in Douglas, Anders, Swenson, Rinaldi, Moffitt, and Evitts, flows not from the Sixth Amendment but instead from the broader and flexible protections of the Fourteenth Amendment guarantees of due process and equal protection. Blandino v. State, 112 Nev. 352, 914 P.2d 624, 626 (Nev. 1996), cert. denied, 519 U.S. 881, 117 S. Ct. 208, 136 L. Ed. 2d 143 (1996).

This distinction is significant, for the Due Process and Equal Protection Clauses, unlike the strict commands of the Sixth Amendment, generally focus on the reliability or fairness of the process. Gilbert v. Homar, 520 U.S. 924, 930, 117 S. Ct. 1807, 1812, 138 L. Ed. 2d 120 (1997); Cafeteria Workers v. McElroy, 367 U.S. 886, 894-95, 81 S. Ct. 1743, 1748, 6 L. Ed. 2d 1230 (1961). In this regard, "due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972); see

also, Gilbert, 520 U.S. at 930; Zinermon v. Burch, 494 U.S. 113, 127, 110 S. Ct. 975, 984, 108 L. Ed. 2d 100 (1990); Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 320, 105 S. Ct. 3180, 87 L. Ed. 2d 220 (1985); Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445, 454, 105 S. Ct. 2768, 2773, 86 L. Ed. 2d 356 (1985).

Thus, the due process guarantee, unlike the Sixth Amendment's guarantee of the right to counsel and self-representation at trial, is meant to "minimize the risk of erroneous decisions," and "the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error." Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 13, 99 S. Ct. 2100, 2106, 60 L. Ed. 2d 668 (1979). The flexibility of due process is "a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." Morrissey, 408 U.S. at 481.

To determine what procedural protections the Constitution requires in a particular case, the Court weighs several factors: (1) the interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens

that the additional or substitute procedural requirement would entail. Zinermon, 494 U.S. at 127.

In defining the process necessary to ensure "fundamental fairness" the Court has recognized that the Due Process Clause does not require that the procedures used are "'so comprehensive as to preclude any possibility of error,'" and that "the marginal gains from affording an additional procedural safeguard often may be outweighed by the societal cost of providing such a safeguard." Walters, 473 U.S. at 320.

The Due Process Clause protects only those "fundamental rights and liberties" which are "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 2268, 138 L. Ed. 2d 772 (1997), citing Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977); Palko v. Connecticut, 302 U.S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937); and Snyder, 291 U.S. at 105; see also, Bowers, 478 U.S. at 193-94.

More recently, this Court has held an action violates due process if it "shocks the conscience" and was so "brutal" that it violates the "decencies of civilized conduct." County of Sacramento v. Lewis, 523 U.S. 833, 1717, 118 S. Ct. 1708, 1716-17, 140 L. Ed. 2d 1043 (1998).

In dealing with challenges to a state's regulation of the right of appeal in criminal cases, the Court applies the traditional rational-basis test. Estelle, 420 U.S. at 538; Rinaldi, 384 U.S. at 309. Under the rational basis test:

> If a legislative classification or distinction "neither burdens a fundamental right nor targets a suspect class, [the Court] will uphold [it] so long as it bears a rational relation to some legitimate end."

Vacco, 521 U.S. at 799, citing Romer v. Evans, 517 U.S. 620, 631, 116 S. Ct. 1620, 1627, 134 L. Ed. 2d 855 (1996).

> [A] classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," [the] statute is presumed constitutional, [and] "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," whether or not the basis has a foundation in the record.

Heller v. Doe, 509 U.S. 312, 320, 113 S. Ct. 2637, 2642-43, 125 L. Ed. 2d 257 (1993).

"Generally speaking, laws that apply evenhandedly to all 'unquestionably comply' with the Equal Protection Clause." Vacco, 521 U.S. at 800; New York City Transit Authority v. Beazer, 440 U.S. 568, 587-88, 99 S. Ct. 1355, 1366-67, 59 L. Ed. 2d 587 (1979). A classification not involving fundamental rights nor proceeding along suspect lines is accorded a "strong presumption of validity." Heller, 509 U.S. at 319.

Here, as stated above, it is well-settled there is neither a constitutional right to an appeal nor to be present at or argue an appeal, and that a state is entitled to wide

discretion in determining its own criminal procedures. Against this background, it is, in language the Court used in addressing a different claimed due process right, "at best, facetious" to claim the right to self-representation on appeal is "'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty,'" or that to deny self-representation on appeal "shocks the conscience" or is so brutal as to violate "decencies of civilized conduct." Bowers, 478 U.S. at 194; Lewis, 523 U.S. at 1717.

In sum, there is simply no good reason to alter years of fundamental understanding about the relationship of the state and federal judicial processes by imposing upon the states a constitutional requirement that they afford a criminal appellant the right to elect self-representation.

B. California's Appellate Process Comports With The Requirements Of The Due Process And Equal Protection Clauses And Bears A Rational Relation To A Legitimate End

1. California's appellate process ensures the right to a thorough appeal brought by competent appellate counsel

The right to appeal a civil or criminal case in California is statutory. Cal. Code Civ. Proc. § 904.1; Cal. Penal Code §§ 1235, 1237, 1466; Scott, 64 Cal. App. 4th at 555 n.6; 9 Witkin, Cal. Procedure (4th ed. 1997), Appeal, § 2, p. 33. California has created various statutory and constitutional provisions to ensure an appellant is

represented by competent counsel and is afforded due process. People v. Grey, 225 Cal. App. 3d 1336, 1339, 275 Cal. Rptr. 572 (1990).

Rule 470 of the California Rules of Court requires trial courts at the time of judgment and sentencing to advise defendants convicted at trial of their appellate rights, including the right to counsel, and the steps that must be taken to protect those rights. Rule 31 of the California Rules of Court provides a defendant sixty days in which to file his notice of appeal. The defendant's trial counsel is required to file for the indigent defendant the notice of appeal or any statement showing reasonable constitutional, jurisdictional or other grounds going to the legality of the proceedings pursuant to California Penal Code sections 1237.5 and 1240.1(b). Scott, 64 Cal. App. 4th at 563-64.

The appointment of counsel for indigent appellants in criminal cases is administered by an independent agency in the Fourth Appellate District, Appellate Defenders Inc. ("ADI"), which performs administrative functions in connection with the appointment of appellate counsel. In re Angelica V., 39 Cal. App. 4th 1007, 1014, 46 Cal. Rptr. 2d 295 (1995). Pursuant to rule 76.5(d) of the California Rules of Court, the state appellate courts are relieved of the duty of assuring the quality of appointed counsel under the guidelines in section 20 of the Standards of Judicial Administration, because the qualified attorneys in ADI are required to "consult with and

assist appointed counsel concerning the issues on appeal and appellant's opening brief." Angelica V., 39 Cal. App. 4th at 1014.

A criminal appellant in California, like a criminal appellant in a federal court, has neither a constitutional nor statutory right to argue his case on appeal or to be present during such proceeding. Cal. Penal Code § 1255; People v. Ashley, 59 Cal. 2d 339, 361, 379 P.2d 496, 29 Cal. Rptr. 16 (1963), cert. denied, 374 U.S. 819, 83 S. Ct. 1714, 10 L. Ed. 2d 1084 (1963); Walker, 56 Cal. App. 3d at 228.

In California, to meet the obligations of a competent advocate, appellate counsel has a duty to prepare a legal brief containing citations to the appellate record and appropriate authority, discuss all material facts, set forth all arguable issues, provide an adequate appellate record and advocate changes in the law if argument can be made supporting change. People v. Barton, 21 Cal. 3d 513, 519, 579 P.2d 1043, 146 Cal. Rptr. 727 (1978); Scott, 64 Cal. App. 4th at 564; People v. Acosta, 48 Cal. App. 4th 411, 426, 55 Cal. Rptr. 2d 675, 683-84 (1996); People v. Harris, 19 Cal. App. 4th 709, 714, 23 Cal. Rptr. 2d 586 (1993).

A criminal appellant in California may nonetheless file in pro se a state petition for a writ of habeas corpus raising any and all claims he believes appellate counsel should have raised, arguing "inexcusable failure of appellate counsel to raise crucial assignments of error [occurred], which arguably

might have resulted in reversal." People v. Mitchell, 68 Cal. App. 4th 1489, 1497, 81 Cal. Rptr. 2d 339, 344 (1999); see also, In re Jones, 27 Cal. App. 4th 1032, 1040-41, 33 Cal. Rptr. 2d 469 (1994); In re Spears, 157 Cal. App. 3d 1203, 1210-14, 204 Cal. Rptr. 333, 337-40 (1984).

A criminal appellant who believes his appellate counsel was ineffective may file a state habeas petition as soon as he or she learns or should have learned of the information offered in support of the claim. See, In re Robbins, 18 Cal. 4th 770, 815 n.35, 959 P.2d 311, 341 n.35, 77 Cal. Rptr. 2d 153 (1998); In re Gallego, 18 Cal. 4th 825, 839 n.15, 959 P.2d 290, 300 n.15, 77 Cal. Rptr. 2d 132 (1998). Appellate counsel's ineffectiveness in failing to raise a claim may be "rectified" by raising the claim in a state petition for a writ of habeas corpus. People v. Denison, 68 Cal. App. 4th 1283A, 79 Cal. Rptr. 2d 524, 534 (1998).

2. Denial of self-representation on appeal comports with due process and equal protection

California's appellate process comports with the requirements of due process and equal protection and bears a rational relation to a legitimate end. First, as stated above, the Court has admonished that the procedures and manner in which a state chooses to adjudicate claims is afforded wide discretion. Carter, 329 U.S. at 176.

Second, California's denial of self-representation on appeal applies evenly to all criminal defendants, and thus the denial unquestionably complies with the Equal Protection Clause. Vacco, 521 U.S. at 793; Beazer, 440 U.S. at 587-88.

Third, the creation of a constitutional right to elect self-representation on appeal raises a series of problematic subsidiary questions, including whether and when the criminal appellant must be given notice of this right, how the right is measured, when must he decide, can he change his mind, and whether the court must treat the self-represented criminal appellant differently and relax or enact different rules. While these concerns were at issue in regards to the recognition of the right to self-representation at trial, Faretta, 422 U.S. at 852 [Blackmun, J. dissenting], as set forth above, the right to appeal, unlike the right at trial, is not a fundamental constitutional right, and is instead governed by the more flexible protections of due process and equal protection. Thus, these are appropriate matters for a state to consider in the decision to grant or deny to the defendant the right to self-representation on appeal.

Moreover, as stated above, it is well-settled, and Petitioner does not dispute, that he has no right to be present at or argue his appeal. Pet. at 22; see, Price, 334 U.S. at 285. In addition to having no right to be present at or ague his appeal, if the state offered appellate counsel, and the criminal appellant nonetheless chose to represent

himself, the state would not be required to provide access to a law library or legal materials. Lewis v. Casey, 518 U.S. 343, 351-52, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996); Bounds v. Smith, 430 U.S. 817, 828, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977); see also, Murray v. Giarratano, 492 U.S. 1, 13, 109 S. Ct. 2765, 2772, 106 L. Ed. 2d 1 (1989) [O'Conner, J., concurring] ["[b]eyond the requirements of Bounds, the matter is one of legislative choice based on difficult policy considerations and the allocation of scarce legal resources."].[3]

A self-represented criminal appellant will, without a law library or legal materials, nonetheless be required to comply with "the relevant rules of procedural and substantive law." Faretta, 422 U.S. at 834, n.46; McKaskle, 465 U.S. at 173.[4]

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3. See also, United States v. Kincaide, 145 F.3d 771, 778 (6th Cir. 1998); Lamp v. State of Iowa, 122 F.3d 1100, 1105 (8th Cir. 1997); Degrate v. Godwin, 84 F.3d 768, 769 (5th Cir. 1996); Glover v. Johnson, 75 F.3d 264, 267 (6th Cir.), cert. denied, 519 U.S. 816, 117 S. Ct. 67, 136 L. Ed. 2d 28 (1996); Brooks v. Buscher, 62 F.3d 176, 179-80 (7th Cir. 1995); Schrier v. Halford, 60 F.3d 1309, 1313 (8th Cir. 1995); Carper v. DeLand, 54 F.3d 613, 616 (10th Cir. 1995); Knop v. Johnson, 977 F.2d 996, 999 (6th Cir. 1992), cert. denied, 507 U.S. 973, 113 S. Ct. 1415, 122 L. Ed. 2d 786 (1993); United States v. Sammons, 918 F.2d 592, 602 (6th Cir. 1990); U.S. v. Smith, 907 F.2d 42, 45 (6th Cir. 1990), cert. denied, 498 U.S. 986, 111 S. Ct. 521, 112 L. Ed. 2d 533 (1990); United States ex rel. George v. Lane, 718 F.2d 226, 231 (7th Cir. 1983); United States v. Wilson, 690 F.2d 1267, 1271 (9th Cir. 1982), cert. denied, 464 U.S. 867, 104 S. Ct. 205, 78 L. Ed. 2d 178 (1983); United States v. Chatman, 584 F.2d 1358, 1359-60 (4th Cir. 1978); Brinson v. McKeeman, 992 F. Supp. 897, 910 (W.D. Tex. 1997).

4. See, Ogden v. San Juan County, 32 F.3d 452, 455 (10th

Finally, a criminal defendant who chooses to represent himself will waive any claim of ineffective assistance of appellate counsel. Faretta, 422 U.S. at 835, n.46; McNeil v. United States, 508 U.S. 106, 113, 113 S. Ct. 1980, 124 L. Ed. 2d 21 (1993); McKaskle, 465 U.S. at 177, n.8.

One result of recognizing a right to self-representation on appeal will be that when the respondent and the state court review the pleadings prepared by self-represented criminal appellants, both will be forced to decipher such materials and in doing so, "out of conscience," the state court will further be forced to wear two hats -- that of a state appellate judge and that of advocate. The Court has held these pleadings are liberally construed, Haines v. Kerner, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972), and adherence to such a policy would complicate a state's ability to function as an effective adversary during appellate proceedings, since the state would be expected to

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Cir. 1994), cert. denied, 513 U.S. 1090, 115 S. Ct. 750, 130 L. Ed. 2d 650 (1995); Wells v. Brown, 891 F.2d 591, 594 (6th Cir. 1989) [collecting cases where courts have required pro se litigants to adhere to basic pleading requirements]; United States v. Flewitt, 874 F.2d 669, 671-676 (9th Cir. 1989); United States v. Merrill, 746 F.2d 458, 465 (9th Cir. 1984), cert. denied, 469 U.S. 1165, 105 S. Ct. 926, 83 L. Ed. 2d 938 (1985).

Thus, for example, in Texas, the failure of a pro se appellant to comply with state rules regarding the content and form of the brief results in the summary denial of such claims. See, e.g., Kindley v. State, 879 S.W.2d 261, 263 (Tex. App. 1994); Sonnier v. State, 913 S.W.2d 511, 520 (Tex. Crim. App. 1995); Pierce v. State, 777 S.W.2d 399, 418 (Tex. Crim. App. 1989), cert. denied, 496 U.S. 912, 110 S. Ct. 2603, 110 L. Ed. 2d 283 (1990).

charitably evaluate the contentions raised by a criminal appellant acting in propria persona. In this regard, the Court may recognize and judicially notice the generally inferior quality of pro se briefs and "the superior ability of trained counsel in the 'examination into the record, research of the law, and marshaling of arguments on [the appellant's] behalf.'" Jones, 463 U.S. at 751, citing Douglas, 372 U.S. at 358. Thus, an obligation to liberally construe pro per pleadings would impair the appellate process for both the respondent state and the reviewing appellate court.

Another result of recognizing such a right is that it renders it more likely the defendant will lose his appeal. See, Faretta, 422 U.S. at 834, 838, 852.[5]

Under these circumstances, granting a criminal appellant a right to self-representation on appeal would be a Pyrrhic victory. The self-represented appellant would have no right to legal materials or counsel in order to file a brief, and, once the brief was somehow drafted and filed without counsel or adequate legal materials, the appellant would have no right to be present at or argue the appeal, and would lose any claim of ineffective assistance. Such a "Pyrrhic

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5. See also, United States v. Baker, 84 F.3d 1263, 1264 (10th Cir. 1996), quoting McKaskle, 465 U.S. at 177, n.8; Fields v. Murray, 49 F.3d 1024, 1031 (4th Cir.), cert. denied, 516 U.S. 884, 116 S. Ct. 224, 133 L. Ed. 2d 154 (1995) ("[A] determination in the defendant's favor here means that he represents himself which, if anything, is more likely to produce a conviction[.]").

victory," as held by one federal court addressing a different issue, would be "cold gruel," and would "do little to burnish the public's perception of the judicial system." CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc., 48 F.3d 618, 621 (1st Cir. 1995).

Moreover, even if it were good policy for California to permit criminal defendants to represent themselves in their direct appeal, such an idea is not mandated by the Constitution. As Justice O'Connor, discussing whether a state should permit a criminal defendant access to a library or grant him an attorney, succinctly put in her concurring opinion in Murray, "the matter is one of legislative choice based on difficult policy considerations and the allocation of scarce legal resources." Murray, 492 U.S. at 13. In our constitutional democracy, such legislative choices are best made by legislators who are subject to removal by the people. See, San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 31, 93 S. Ct. 1278, 1295, 36 L. Ed. 2d 16 (1973). A "'mother knows best' approach should play no part in traditional constitutional adjudication." Murray, 492 U.S. at 11 [Plurality opinion of Rehnquist, C.J.].

In sum, this Court has held that unlike a trial, the criminal defendant needs an attorney on appeal "as a sword to upset the prior determination of guilt." Ross, 417 U.S. at 611. Moreover, the Court has held that "[i]t is undeniable that in most criminal prosecutions defendants could better

defend with counsel's guidance than by their own unskilled efforts." Faretta, 422 U.S. at 834, emphasis added. "The appellate lawyer must master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal." McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429, 438, 108 S. Ct. 1895, 1901, 100 L. Ed. 2d 440 (1988). Direct appeal "is the primary avenue for review of conviction or sentence" as "[w]hen the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence." Barefoot v. Estelle, 463 U.S. 880, 887, 103 S. Ct. 3383, 3391, 77 L. Ed. 2d 1090 (1983).

Under these circumstances, "the services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits." Evitts, 469 U.S. at 387, 393. "Capable lawyering [on direct appeal] would mean fewer colorable claims of ineffective assistance of counsel to be litigated on collateral attack." Murray, 492 U.S. at 11.

Finally, as stated above, California has adequately provided a vehicle for a criminal appellant to bring before the state court those claims not brought by appointed counsel, through a state petition for a writ of habeas corpus. Robbins, 18 Cal. 4th at 815, n.35; Mitchell, 68 Cal. App. 4th at 1496-98.

California has rationally chosen to create an appellate review process by which counsel is appointed on direct appeal, and the criminal appellant is free to file any additional claims in a state petition for a writ of habeas corpus. This appellate process comports with the fundamental protections of due process and equal protection, "promotes the efficient, dignified operation" of the courts, Estelle, 420 U.S. at 537, and "advances an interest in efficient, dignified appellate practice," Ortega-Rodriguez v. United States, 507 U.S. 234, 241, 113 S. Ct. 1199, 1204-05, 122 L. Ed. 2d 581 (1993).

II.

THE STATES AND FEDERAL COURTS ARE DIVIDED AS TO WHETHER A CRIMINAL APPELLANT HAS THE CONSTITUTIONAL RIGHT TO ELECT SELF-REPRESENTATION

The states and federal courts are divided as to whether a criminal appellant has a constitutional right to elect self-representation. Respondent submits that, as outlined above, the most persuasive authorities, including California, Nevada,[6] Tennessee,[7] Maryland,[8] Florida[9] and the Fourth[10] and Seventh Circuits[11] have found no such right in the text of the Constitution. Some other jurisdictions have had contrary views.[12]

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6. Blandino, 914 P.2d at 626.

7. State v. Gillespie, 898 S.W.2d 738, 741 (Tenn. Crim. App. 1994); Weatherly v. State, 704 S.W.2d 730, 731 (Tenn. Crim. App. 1985); State v. Cole, 629 S.W.2d 915, 917 (Tenn. Crim. App. 1981); State v. Reeves, 610 S.W.2d 730, 731 (Tenn. Crim. App. 1980).

8. Callahan v. State of Maryland, 30 Md. App. 628, 354 A.2d 191, 194 (Md. App. 1976).

9. Hill v. State, 656 So. 2d 1271, 1272 (Fla. 1995).

10. United States v. Gillis, 773 F.2d 549, 559-60 (4th Cir. 1985).

11. Lumbert v. Finley, 735 F.2d 239, 245-46 (7th Cir. 1984).

12. Texas: Webb v. State, 533 S.W.2d 780, 783 (Tex. Crim. App. 1976); Hathorn v. State, 848 S.W.2d 101, 123 (Tex. Crim. App. 1992); New Mexico: State v. Lewis, 104 N.M. 218, 719 P.2d 445, 447-48 (N.M. App. 1986); Michigan: People v. Stephens, 71 Mich. App. 33, 246 N.W.2d 429, 432 (Mich. App. 1976); Arkansas: Gidron v. State, 312 Ark. 517, 850 S.W.2d 331, 332-33 (Ark. 1993); State v. Van Pelt, 305 Ark. 125, 810 S.W.2d 27 (Ark. 1991); Pennsylvania: Com. v. Rogers, 537 Pa. 581, 645 A.2d 223, 224 (Pa. 1994); Louisiana: State v. Warner, 594 So. 2d 397, 402 (La. App. 1991); Indiana: Webb v. State, 274 Ind. 540, 412 N.E.2d 790, 792 (Ind. 1980); Campbell v. Blodgett, 940 F.2d 549 (9th Cir. 1991) (but see, Hines v.

CONCLUSION

Petitioner presents no issue worthy of discretionary review by this Court. It is well-settled that there is neither a constitutional right to an appeal nor to be present at or argue an appeal, and that a state is entitled to wide discretion in determining its own criminal procedures. There is nothing explicit or implicit in the Constitution or in this Court's Faretta decision which grants to a criminal appellant a constitutional right to elect self-representation, and the denial of the right is reviewed under the rational basis test. In light of the important interests of the criminal appellant, the state, and the courts, there is a rational basis for the

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Enomoto, 658 F.2d 667, 677 (9th Cir. 1981)); Chamberlain v. Ericksen, 744 F.2d 628, 630 (8th Cir. 1984), cert. denied, 470 U.S. 1008, 105 S. Ct. 1368, 84 L. Ed. 2d 387 (1985); United States v. Wagner, 158 F.3d 901, 902 (5th Cir. 1998); Myers v. Johnson, 76 F.3d 1330, 1333-34 (5th Cir. 1996); Myers v. Collins, 8 F.3d 249, 252 (5th Cir. 1993); Gomez v. Collins, 993 F.2d 96, 97 (5th Cir. 1993); United States v. Spence, 992 F. Supp. 1413 (S.D. Ga. 1998); United States ex rel. Williams v. O'Leary, 712 F. Supp. 662, 665 (N.D. Ill. 1989); see also, Horton v. Dugger, 895 F.2d 714, 718 (11th Cir. 1990) (Eleventh Circuit discussed the issue, but did not decide whether there was a constitutional right to self-representation on appeal because "appellant presented no evidence to the district court that he did not desire to be represented by counsel on appeal.").

refusal to permit self-representation on appeal, and this denial comports with the requirements of due process and equal protection. Accordingly, the Petition for a Writ of Certiorari should be denied.

Dated: March 18, 1999.

Respectfully submitted,

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EDITOR'S NOTE

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

SALVADOR MARTINEZ,
PETITIONER,

V.

COURT OF APPEAL OF CALIFORNIA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

SALVADOR MARTINEZ
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30 pp

QUESTION PRESENTED

DOES THE CLEARLY ESTABLISH SIXTH AMENDMENT RIGHT TO SELF-REPRESENTATION AT "TRIAL", BY A DEFENDANT AS ANNOUNCED BY THIS COURT IN FARETTA V. CALIFORNIA 95 S.CT. 2525 (1975), APPLY TO SELF-REPRESENTATION ON "APPEAL" BY AN APPELANT?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998
NO. 98-7809

SALVADOR MARTINEZ,
PETITIONER

V.

COURT OF APPEAL OF CALIFORNIA
RESPONDENT.

STATEMENT OF THE CASE

PETITIONER REPRESENTED HIMSELF IN PRO-SE AT TRIAL AND WAS CONVICTED BY A JURY IN VIOLATION OF SECTION 503, CAL. PENAL CODE. THE JURY ALSO FOUND TRUE THAT PETITIONER HAD SUFFERED THREE ARIOR CONVICTIONS WITHIN THE OF THE "THREE STRIKES LAW," SECTIONS 667(d)(E)(2), 1170.12(B)(C). PETITIONER WAS SENTENCED TO TWENTY-FIVE TO LIFE IN STATE PRISON. PETITIONER TIMELY FILED HIS NOTICE OF APPEAL. ON OCTOBER 16, 1998, PETITIONER'S REQUEST TO PROCEED IN PRO-SE ON APPEAL WAS DENIED BY THE FOURTH APPELLATE DISTRICT, DIVISION THREE.
THE COURT CITED IN RE WALKER, 56 CAL. APP. 3d 225, FOR ITS DENIAL.

ON OCTOBER 27, 1998 PETITIONER FILED A PETITION FOR WRIT OF MANDATE WITH THE CALIFORNIA SUPREME COURT IN CASE NO. S074340. ON NOVEMBER 18, 1998, THE PETITION WAS DENIED.

PETITIONER FILED HIS PETITION FOR WRIT OF CERTIORARI ON DECEMBER 29, 1998.
ON JANUARY 14, 1999, THE FOURTH APPELLATE DISTRICT, DIVISION THREE, GRANTED PETITIONER'S REQUEST FOR A STAY OF HIS APPEAL PENDING THE RESOLUTION BY THIS COURT ON THE PETITION FOR WRIT OF CERTIORARI.

REASONS FOR GRANTING THE WRIT

To resolve the conflict and continuing split among the Federal and State Court(s) as to whether the Sixth Amendment confers the right to Self-representation on "appeal" based on this Court's decision in FARETTA V. CALIFORNIA (1975) 95 S.Ct. 2525 and related cases based on Constitutional analysis and application, e.g., Sixth and Fourteenth Amendments to the United States Constitution.

Therefore, the Writ should be granted to resolve the conflict (as) the "conflict" is substantial, e.g., there are (17) seventeen Federal and State Appellate court(s) recognizing the Sixth Amendment right, under FARETTA, to self-representation on appeal, Footnote (1), and (7) seven Appellate Court(s) declining to extend the FARETTA right to self-representation on appeal, Footnote (2).

FOOTNOTE(S)

(1). WEBB V. STATE (1980) 274 Ind. 540-412, N.E. 2d 790. 792; WEBB V. STATE, 533 S.W. 2d 780,783 (Tex. Crim. App. 1976); HATHORN V. STATE, 848 S.W. 2d 101,123 (Tex. Crim. App. 1992); STATE V. LEWIS, 104 N.M. 218,719 P.2d 445, 447-48 (N.M. App. 1986); PEOPLE V. STEPHENS, 71 Mich. app. 33, 246 N.W. 2s 429,432 (Mich. App. 1976); GIDRON V. STATE, 312 Ark. 517, 850 S.W. 2d 331, 332-33 (Ark. 1993); STATE V. VAN PELT, 305 Ark. 125, 810 S.W. 2d 27 (Ark. 19-91); PENNSYLVANIA, COM. V. ROGERS, 537 Pa. 581, 645 A.2d 223,224 (Pa. 1994)' LOUISIANA, STATE V. WARNER, 594 So. 2d 397,402 (La. App. 1991); CAMPBELL V. BLODGETT, 940 F.2d 594 (9th Cr. 1991); HENDRICKS V. ZENON, 993 F.2d 664,669 (th Cir. 1993)· CHAMBERLAIN V. ERICKSEN, 744 F.2d 628,630 (8th Cir. 1984);

A. The decision(s), including Calirornia's, declining to extend the right to self-representation on appeal are incorrect.

This Court in FARETTA V. CALIFORNIA 95 S.Ct. 2525 (1975) held..... "[T]he Sixth Amendment as made applicable to the States by the Fourteenth Amendment guarantees a defendant in a state criminal trial [the] Constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so, and tnat the state may not force a lawyer upon him when he wants to conduct his own defense".

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FOOTNOTES CONTINUED FROM PAGE THREE

FOOTNOTE (1) CONTINUED. U.S. V. WAGNER, 158 F.3d 901,902 (5th Cir. 1998); MYERS V. JOHNSON, 76 F.3d 1330, 1333-34 (5th Cir. 1996); MYERS. V. COLLINS. 8 F.3d 249,252 (5th Cir. 1993); GOMEZ V. COLLINS, 993 F.2d 96 (5th Cir. 1993); U.S. V. SPENCE, 992 F. Supp. 1413 (S.D. Ga. 1998); U.S. V. ex rel. WILLIAMS V. O'LEARY, 712 F. Supp. 662 (N.D. I11. 1989);

FOOTNOTE (2). STATE V. GILLESPIS, 898 S.W. 2d 738 (Tenn. Crim App. 1994): WEATHERLY V. STATE, 704 S.W. 2d 730 (Tenn. Crim. App. 1985); STATE V. COLE, 629 S.W. 2d 915 (Tenn. Crim. App. 1981); STATE V. REEVES, 610 S.W. 2d 730 (Tenn. Crim. App. 1980); CALLAHAN V. STATE OF MARYLAND, 30 Md. App. 628, 354 A.2d 191 (Md. App. 1976); HILL V. STATE, 656 So. 2d 1271 (Fla. 1995); U.S. V. GILLIS, 773 F.2d 549 (4th Cir. 1985); LUMBERT V. FINLEY, 735 F.2d 239 (7th Cir. 1984

The FARETTA Court defined the Sixth Amendment with all of its' correlative rights and protection, including the subject matter before this Court, e.g., "to have assitance of counsel", "are part of the due process of law that is guaranteed by the Fourteenth amendment to defendants in criminal courts of state". Petitioner points out that the FARETTA Court did not distinguish "criminal trial court" [and] the "criminal appellate court". The FARETTA Court held that the "[S]ixth Amendment does nnot provide merely that defense shall be made for accused but grants to accused personally the right to make a defense", e.g., "right to sel-representation to make one's own defense personally". Id., at 2533

Here, it was Petitioner who represented himself and prepared his own defense at the trial level. Petitioner prepared his own defense during the merits of the trial. It was Petitioner who challenged the constitutionally of the California's "Three Strikes Law" by way of statutory and non-statutory Motion(s). It was Petitioner who made all of the objections to preserve his objections and challenges for Appellate review. To allow Appellate Counsel to prepare a defense on appeal, will not be Petitioner's own defense [which] he perfected and preserved for Appellate.

It is Petitioner's life that hings in the Appellate process and not that of Counsel. It is Petitioner liberty that is at stake and not Counsel's. It is Petitioner who will "suffer the consequences" if the Appellate Court rejects his defense and affirms the judgment and sentence of the Trial Court.

The FARETTA Court went on to say...."[T]he lanuage and spirit of the Sixth Amendment contemplate that counsel, like the other tools guaranteed by the Amendment, shall be an aid to a willing defendant not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel uopn the accused, aginst his considered wish, thus violates the logic of the Amendment". Id. at 2533.

Thus, the Respondent Court is in grave error in denying Petitioner his Constitutional right to prepare his own defnese and is in grave error in "thrusting unwanted counsel" upon Petitioner. Sixth and Fourteenth Amendments, respectively; FARETTA, supra; ADAMS V. U.S. 63 S.Ct. 236.

The FARETTA Court firmly held the Sixth amendment right to assistance of counsel included the right to represent one-self. Id., at 2530-2534. The FARETTA Court did not make the constitutional right of sefl-represention subject to any conditions except a "knowingly and intelligent waiver of the right to counsel". Accord, see also, HENDRICKS V. ZENON, 993 F.2d 664,669 (9th Cir. 1993) and MOORE V. CALDERON, 108 F.3d 261 (9th Cir. 1996). Here, Petitioner provided the Respondent Court with [his] "unequivocal" assertion of his right to represent himsel on appeal and further provided the Respondent Court with his "waiver of right to Counsel" on appeal.

The FARETTACourt did not distinguish the Sixth Amendment right to represent one-self at "trial" [or] "appeal". Nor did the FARETTA Court announce that the Sixth Amendment right to represent one-self on "appeal" does not apply as Respondent suggest. Further, the Faretta Court did not divide the Constitutional right to represent one-self between two class of people, e.g., a defendant at "trial" and an Appellant on "appeal". That would in of itself violate the equal protection clause of the Fourteenth Amendment.

Eventhough, the Faretta Court did use the "magic" word "appeal, there can be no constitutional difference between a "trial" or "appeal" if one chooses to exercise the "clearly estblished constitutional right to represent one-self on appeal [and] reject counsel for the purpose of appeal.

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In WEBB V. STATE (1980) 274 Ind. 540, 412 N.E. 2d 790,792, the Indiana Supreme Court held:

"The question of whether the Sixth amendment also guarantees self-resentation on appeal has not been passed by the U.S. Supreme Court, but since the Sixth Amendment right to counsel is applicable at both trial and appeal, Douglas v. California (1963) 376 U.S. 353, it follows that there is a correlative right to reject counsel and proceed pro-se both at trial and on appeal of a criminal case. There is no meaningful distinction between conducting a defense at trial and prosecuting an appeal that prevents the application of the Faretta rationale to the case of an appellant who wishes to refect representation by counsel and instead represent himself on appeal". See also, WEBB V. STATE (Tex. Crim. App. 1976) 533 S.W. 2d 783; and HATHORN V. STATE (TEx. Cr. App. 1997) 848 S.W. 2d 101, 123. The Texas Court of Criminal Appeals holding the same reasoning.

A worthy note at this point, the FARETTA Court, citing CARTER V. ILLINOIS 67 S,Ct, 216, 91 L.Ed. 172, held....."[N]either the historic coneption of due process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself or to confess guilt. Under appropriate circumstances the Constitution requires counsel be tendered; it does not require that under all circumstances counsel be foreced upon a defendant". Id., at 2531, footnote (12). See also, MOORE V. MICHIGAN, 355 U.S. 155, 161, 78 S.Ct. 191,195, 2 L.Ed. 2d 167.

Up to this point, Petitioner has shown that the Sixth and Fourteenth Amendments confers the Constitutional right to represent himself and the Constitutional right to reject counsel. FARETTA, supra; CARTER, supra; and MOORE, supra.

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An important issue which has not been viewed [or] addressed by the California Appellate Court(s) and the other Appellate Court(s) rejecting the self-representation right on appeal [is] the "Constitutional right to reject counsel". The FARETTA Court upheld this Constitutional right, Id., at p.p. 2530-2531, citing with approval, ADAMS V. U.S. EX REL. McCANN, 63 S.Ct. 236, 241 87 L.Ed. 268. In ADAMS, this Court recognized that the Sixth Amendment right to assistance of Counsel implicitly embodies a "correlative right to dispense with a lawyer's help" and that "the Constitution does not force a lawyer upon a defendant". Id., at 63 S.Ct. at 242. The ADAMS Court further stated. VIZ:

> "[T]he right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law....What were contrived as protections for the accused should not be turned into fetters. To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the the worth of great Constitutional safeguards by treating them as empty verbalisms...When the administration of the criminal law...is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards...is to imprison a man in his privileges and call it the Constitution". Id., 63 S.Ct. at 241-242.

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Here, the Respondent Court has already "shackled" Petitioner's feet and violated the Constitutional right to "dispense" with Counsel. FARETTA, supra; and ADAMS, supra. Even after Petitioner submitted his "waiver" of Counsel, the Respondent Court appointed Counsel on Appeal on January 12, 19-99. See, "Order For Counsel ON Appeal", attached hierein, marked Exhibit "A". Here, the damage has been done.

Petitioner does not have a problem with Attorney Mishkin. In fact Attorney Mishkin has been very professional and effective. The issue here is Petitioner's right [to] "free choice", e.g., the Constitutional right to "dispense" with Counsel. Faretta, supra; Adams; supra; and Carter, supra; 95 S.Ct. at 2530-2531. Sixth and Fourteenth Amendments. The Fifth Circuit in MYERS V. COLLINS (5th Cir. 1993) 8 F.3d 249,252, held...."whether at trial or appeal, a defendant is not required to accept unwanted counsel".

The Attorney General is correct when he states that "the right to appeal a ....criminal case in California is statutory" [and] "there is no Constitutional right to appeal". It is, however, well established that "when a state opts to""...establish....a "system of appellate review as of right... it must nonetheless act....in accord with the due process clause of the Fourteenth Amendment". EVITTS V. LUCEY (1985) 83 L.Ed. 2d 821, 105 S.Ct. 830.

The EVITTS court concluded that the Sixth Amendment right to effective assistance of counsel at "trial", applies with equal force on "appeal", e. g., the Sixth Amendment right to "effective assistance of counsel on first appeal as of right guaranteed by due process clause of Fourteenth". Thus, the Sixth Amendment right to represent one-self at "trial" applies with equal force on "appeal under rational of EVITTS and FARETTA.

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ONCE A DEFENDANT OR AN APPELLANT INVOKES HI'S OR HERS DUE PROCESS TO "DISPENSE" WITH COUNSEL, HE OR SHE BECOMES "ASSISTANCE" OF COUNSEL, E.G., THEIR OWN COUNSEL FOR THE PURPOSE OF THE SIXTH AMENDMENT. THE FARETTA COURT REASONED THAT....."[T]HE COUNSEL PROVISION SUPPLEMENTS THIS DESING. IT SPEAKS OF THE "ASSISTANCE" OF COUNSEL AND AN ASSISTANT, HOWEVER, EXPERT, IS STILL AN ASSISTANT." Id. AT 2553.

THUS, IF THE DUE PROCESS CLAUSE GUARANTEES THE RIGHT TO THE "ASSISTANCE OF COUNSEL" ON APPEAL, AS OF RIGHT, AND IF THAT "ASSISTANT" IS THE APPELLANT, THEN THE SIXTH AMENDMENT GRANTS THE RIGHT TO MAKE HIS OWN DEFENSE ON APPEAL. THE SIXTH AND FOURTEENTH AMENDMENTS GUARANTEES THE RIGHT TO "ASSISTANT OF COUNSEL ON APPEAL"; THE RIGHT TO PRESENT HIS OWN DEFENSE ON APPEAL AND THE RIGHT TO "DISPENSE" WITH COUSEL FOR THE PURPOSE OF THAT APPEAL. FARETTA, SUPRA; EVITTS, SUPRA; ADAMS; SUPRA.

THE LOUISIANA APPELLATE COURT HELD.... "A DEFENDANT RIGHT TO SELF-REPRESENTATION EXTENDS TO HIS FIRST APPEAL." SEE, STATE V. WARNER (LA. CT. APP. 1991) 594 SO.2d 397, 402. THE NEW MEXICO COURT OF APPEALS IN STATE V. LEWIS (1986) 104 N.W. 218, 719 P.2d 445, 447, CONCLUDED...."AN ACCUSED HAS A CONSTITUTIONAL RIGHT TO PROSECUTE HIS OWN APPEAL."

THE ATTORNEY GENERAL FURTHER ARGUES THAT "A CRIMINAL DEFENDANT HAS NO CONSTITUTIONAL RIGHT TO BE PRESENT AT OR ARGUE AN APPEAL" AND CITES, PRICE V. JOHNSTON, 68 S.CT. 1049, 92 L.E.d 1356 (1948). THE PRICE COURT REASONED THE..."THE DISCRETIONARY NATURE OF THE POWER IN QUESTION GROWS OUT OF THE FACT THAT A PRISONER HAS NO ABSOLUTE RIGHT TO ARGUE HIS OWN APPEAL OR EVEN TO BE PRESENT AT THE PROCEEDINGS IN AN APPELLATE COURT.

THIS IS NOT THE ISSUE HERE. PETITIONER IS NOT SAYING HE HAS A RIGHT TO BE PRESENT AND ARGUE HIS APPEAL BEFORE THIS COURT OR THE RESPONDENT COURT. PETITIONER IS SAYING HE HAS A CONSTITUTIONAL RIGHT TO REJECT COUNSEL AND CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF ON APPEAL. PRICE IS DISTINGUISHABLE.

PRICE WAS REASONED OUT OF STATUTORY APPLICATION AND NOT "CONSTITUTIONAL" ANALYSIS AND GUARANTEES. A WORTHY NOTE IN CHIEF JUSTICE BURGER'S DISSENT IN FARETTA STATED... "ALTHOUGH THE COURTS OF APPEALS POSSESS THE POWER TO COMMAND THAT A PRISONER BE PRODUCED TO ARGUE HIS OWN APPEAL, THE EXERCISE OF THAT POWER IS A MATTER OF SOUND JUDICIAL DISCRETION."

THUS, WITH THESE COMMENTS, IT CAN BE SEEN THAT THE ISSUE IS TO BE "PRODUCED" BEFORE THE APPELLATE COURT "TO ARGUE HIS OWN APPEAL." A CLOSER READING OF THE COMMENT, THE APPELLATE COURT(S) STILL "POSSESS THE POWER TO COMMAND THAT A PRISONER BE PRODUCED "Id., AT 2541, AGAIN, UNDER "STATUTORY" AUTHORITY AT ISSUE IN PRICE. THE PRICE IS DISTINGUISHABLE. AS THE EIGHTH CIRCUIT COURT OF APPEAL IN CHAMBERLAIN V. ERICKSEN (8TH CIR. 1984) 744 F.2d 628, 630 CORRECTLY HELD...."A DEFENDANT'S RIGHT TO FILE A PRO-SE BRIEF OR MOTIONS IS DISTINGUISHABLE FROM A DEFENDANT'S RIGHT TO MAKE ORAL ARGUMENTS BEFORE THE COURT." CITING PRICE V. JOHNSTON, 344 U.S. 266, PRICE [IS] DISTINGUISHABLE.

THE ATTORNEY GENERAL FURTHER& ARGUES THAT THERE HAS TO BE A SHOWING THAT THE DENIAL OF SELF-REPRESENTATION ON APPEAL MUST "SHOCK THE CONSCIENCE" OR IS SO BRUTAL AS TO VIOLATE "DECENCIES OF CIVILIZED CONDUCT." THIS IS NOT APPLICABLE AND FAR FROM THE STANDARD OF REVIEW ON THE ISSUE AT BAR.

FIRST, THERE IS A SUBSTANTIAL CONFLICT AMONG THE FEDERAL AND STATE APPELLATE COURT(S) THAT MUST BE RESOLVED BY THIS COURT ON THE ISSUE OF THE CONSTITUTIONAL RIGHT TO REPRESENT ONE-SELF ON APPEAL AND THE CONSTITUTIONAL RIGHT TO "DISPENSE" WITH COUNSEL. NEITHER ISSUE "SHOCKS THE CONSCIENCE" BUT IS A CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT. SECOND, THE STANDARD OF REVIEW IS SETOUT BY THIS COURT IN DOUGLAS AND FARETTA V. CALIFORNIA; ADAMS V. U.S.; CARTER V. ILLINOIS. SUPRA; AND EVITTS V. LUCEY, SUPRA; [AND] THE (17) SEVENTEEN APPELLATE COURTS CONFENING THE RIGHT TO SELF-REPRESENTATION ON APPEAL AND THE RIGHT TO REJECT COUNSEL. THE SIXTH AND FOURTEENTH AMENDMENTS CONFERS THESE CONSTITUTIONAL RIGHT OF SELF-REPRESENTATION AND THE RIGHT TO "DISPENSE" WITH COUNSEL ON APPEAL.

THE ATTORNEY GENERAL ALSO ARGUES THAT "THE CREATION OF A CONSTITUTIONAL RIGHT TO ELECT SELF-REPRESENTATION ON APPEAL RAISES A SERIES OF PROBBLEMATIC SUBSIDARY OF QUESTIONS." (AT PG.21). THE FARETTA COURT, AS THE RESPONDENT RECOGNIZES, SETTLED THESE "PROBLEMS." IT HAS BEEN (24) YEARS SINCE FARETTA AND THERE HAS BEEN NO "PROBLEM." EVEN IN THE APPELLATE LEVEL, WHERE ONE CAN REPRESENT HIMSELF. PETITIONER REPRESENTED HIMSELF BEFORE THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA AND BEFORE THE NINTH CIRCUIT COURT OF APPEALS. SEE ATTACHED ORDERS, MARKED EXHIBITS "B" AND "C", RESPECTIVELY. ONE CAN REQUEST HIS SELF-REPRESENTATION RIGHT AND THE RIGHT TO "DISPENSE" WITH COUNSEL BY "WAIVER". WITH THE TRIAL OR APPELLATE COURT AND HOLD A "TELEPHONIC HEARING" REGARDING THE FARETTA ADMONISHMENTS. THUS, THERE IS AND HAS NOT BEEN ANY "PROBLEM."

THERE IS NO TRIAL JUDGE OR APPELLATE COURT WHICH WOULD ALLOW ANY "PROBLEM" OR "ABUSE."

AS CAN BE SEEN BY THE ATTACHED ORDERS, PETITIONER REPRESENTED HIMSELF ON APPEAL AND "WAIVED COUNSEL" BEFORE THE NINTH CIRCUIT COURT OF APPEALS. THE NINTH CIRCUIT IS ONE OF THE APPELLATE COURTS THAT ALLOWS PRO-SE APPEALS. IT IS IRONIC THAT THE STATE OF CALIFORNIA SITS IN THE NINTH CIRCUIT AND DOES NOT FOLLOW THEIR PRESIDENTS. SEE, HENDRICKS V. ZENON, 993 F.2d 664, 669 (9TH CIR. 1993) AND CAMPBELL V. BLODGETT. 940 F.2d 549 (9TH CIR. 1991.)

THE ATTORNEY GENERAL FURTHER SUGGESTS THAT THE "DENIAL OF SELF-REPRESENTATION ON APPEAL COMPORTS WITH DUE PROCESS AND EQUAL PROTECTION." THE ATTORNEY GENERAL IS INCORRECT. FIRST, THE DENIAL VIOLATES DUE PROCESS IN THAT IT FORECLOSES THE DUE PROCESS RIGHT TO "DISPENSE" WITH COUNSEL. FARETTA, SUPRA; MOORE, SUPRA; (78 S.CT. 141, 195) AND ADAMS, SUPRA. IT FURTHER VIOLATES THE SIXTH AMENDMENT RIGHT TO PRESENT ONE'S OWN DEFENSE. FARETTA, SUPRA.

SECOND, THE PRACTICE VIOLATES "EQUAL PROTECTION" IN THAT A "DEFENDANT" AT TRIAL IS AFFORDED THE RIGHT TO "DISPENSE" WITH COUNSEL AND SELF-REPRESENTATION AND AN "APPELLANT" IS NOT AFFORDED THESE RIGHTS. IT IS VERY SIMPLE. THE "EQUAL PROTECTION" CLAUSE SAY(S) "EQUAL" NOT "UNEQUAL." FURTHER, THERE ARE (17) OTHER JURISDICTION(S) WHICH ALLOW SELF-REPRESENTATION AND THE RIGHT TO "DISPENSE" WITH COUNSEL AT "TRIAL" AND ON "APPEAL." RESPONDENTS SUGGEST THAT CALIFORNIA SHOULD BE ALLOWED TO "RUN" THEIR OWN APPELLATE SYSTEM. THE STATE OF CALIFORNIA IS NOT A "SOVEREIGN" STATE ON THE ISSUE AT BAR. IT IS PART OF THE "UNITED" STATES. THE FRAMERS OF THE CONSTITUTION CALLS IT THE "UNITED" STATES CONSTITUTION AND NOT THE "DIVIDED" STATES CONSTITUTION, ALSO THIS IS WHY THIS COURT IS CALLED THE "UNITED" STATES SUPREME COURT. THIS COURT SITS AS THE SUPREME COURT TO ENFORCE THE UNITED STATES CONSTITUTION.

WHEN A STATE HAS RUN AFOUL OF THE UNITED STATES CONSTITUTION, THIS COURT HAS NOT HESITATED TO ENFORCED THE RIGHTS AND PROTECTIONS OF THE UNITED STATES CONSTITUTION MANY TIMES OVER [AND] THIS COURT SHOULD NOT HESITATE NOW. THE STATE OF CALIFORNIA AND ITS 'APPELLATE PRACTICE(S) HAVE RUN AFOUL OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THIS COURT MUST ~~■~~ BRING THE STATE OF CALIFORNIA TO "COMPORT" WITH THE RIGHTS AND PROTECTION(S) AND ~~FACE~~ FORCE THE STATE OF CALIFORNIA WITHIN THE REALM AND CONFINES OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION NAMELY, THE SIXTH AND FOURTEENTH AMENDMENT(S) RIGHT TO "DISPENSE" WITH COUNSEL AND THE RIGHT TO REPRESENT ONE-SELF ON APPEAL. FARETTA, SUPRA; ADAMS, SUPRA; CARTER, SUPRA; AND MOORE, SUPRA. DOUGLAS, SUPRA; AND EVITTS, SUPRA.

CONCLUSION

PETITIONER HAS PRESENTED A CONFLICT WHICH EXSIST AMONG THE FEDERAL AND STATE APPELLATE COURT(S) THAT MUST BE RESOLVED BY THIS COURT. E.G., THE CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION ON APPEAL AND THE CONSTITUTIONAL RIGHT TO REJECT COUNSEL FOR THE PURPOSE OF APPEAL.

PETITIONER HAS DEMOSTRATED THAT THE SIXTH AND FOURTEENTH AMENDMENT(S) TO THE UNITED STATES CONSTITUTION CONFERS THE CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION ON APPEAL AND THE CONSTITUTIONAL RIGHT TO "dispense" WITH COUNSEL ON APPEAL.

ACCORDINGLY, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

RESPECTFULLY SUBMITTED,

x Salvador Martinez

SALVADOR MARTINEZ
PETITIONER IN PRO-SE

DATED:
April 2, 1999

DECLARATION OF SERVICE

I, SALVADOR MARTINEZ, HEREBY DECLARE THAT A COPY OF THE FOREGOING REPLY HAS BEEN SERVED BY PLACING SAME IN THE U.S. MAIL FROM THE CAL. STATE PRISON IN LANCASTER, CA. AND IN ACCORD WITH HOUSTON V. LUCEY. S.CT. — ON THIS 7 DAY OF APRIL, 1999, ADDRESS TO;

1. COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION THREE
925 N. SPURGEON ST.
SANTA ANA, CA. 92701-3700

2. ROBERT M. FOSTER
DEPUTY ATTORNEY GENERAL
110 WEST "A" ST. SUITE 1100
SAN DIEGO, CA. 92101

Salvador Martinez
SALVADOR MARTINEZ
DECLARANT

COURT OF APPEAL-4TH DIST. DIV. 3
FILED
OCT 16 1998
Deputy Clerk

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **SALVADOR MARTINEZ,** **Defendant and Appellant.**	**G024042** **(Super. Ct. No. 98CF1062)** **ORDER**

Appellant's motion to represent himself on appeal is DENIED. (*In re Walker* (1976) 56 Cal.App.3d 225.)

SILLS, P.J.
SILLS, P.J.

THE STATE OF CALIFORNIA
COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION THREE

COURT OF APPEAL-4TH DIST. DIV. 3
FILED

Stephen M. [illegible], Clerk
Deputy Clerk

Case No. G024042

People v. Salvador Martinez

Superior Ct. No. 98CF1062 Orange County

ORDER FOR COUNSEL ON APPEAL

Cindi B. Mishkin, of Appellate Defenders, Inc., is appointed for the Appellant.

This case will be an Appellate Defenders, Inc. staff case.

Submitted by: Dawn Kuebler On: January 11, 1999
APPELLATE DEFENDERS, INC.

_____ The record on appeal has not been filed.

_✓_ The record on appeal has been filed and the time to file appellant's opening brief is extended to 2-22-99.

SILLS, P.J.
Presiding Justice

cc: Attorney General, Appellate Defenders, Inc., Appellant's

(D10A Notice to be sent to Superior Court)

Attorney's Name, Address and No.	Appellant's Name and Address
Cindi B. Mishkin Appellate Defenders, Inc. 233 "A" Street, Suite 1200 San Diego, CA 92101 (619) 696-0282 State Bar No. 169537	Salvador Martinez, # P10344 44750 60th Street West Lancaster, CA 93536

EXHIBIT "A"

FILED
JUN 5 2 38 PM '96
EASTERN DISTRICT
BY

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SALVADOR P. MARTINEZ, JR., Defendant/Appellant, v. UNITED STATES OF AMERICA, Plaintiff/Appellee.	CR-F-95-5256 OWW ORDER ON MOTION TO PROCEED ON APPEAL IN PRO SE

Appellant, Salvador P. Martinez, Jr., has applied to the Court for permission to proceed on appeal in pro se.

To the extent this Court has jurisdiction regarding representation before the Court of Appeal, Defendant has demonstrated experience and background to enable him to prosecute his appeal.

/////

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/////

EXHIBIT "B"

IT IS ORDERED that Salvador P. Martinez, Jr., shall be permitted to prosecute his appeal in pro se.

DATED: May 28, 1996.

Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

martinez.pl

FILED
JUL 11 1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. SALVADOR P. MARTINEZ, JR., Defendant-Appellant.	No. 96-10235 DC# CR-95-5256-OWW Eastern California (Fresno) ORDER

Before: NOONAN, LEAVY and TASHIMA, Circuit Judges

This court has received copies of appellant's motion to proceed on appeal pro se, filed on May 16, 1996 with the district court, and the district court's June 5, 1996 order granting appellant's motion. Court records do not show, however, that the district court engaged in the colloquy required by Faretta v. California, 422 U.S. 806 (1975) to confirm that appellant's request was knowing, intelligent, and unequivocal. See Hendricks v. Zenon, 993 F.2d 664, 669 (9th Cir. 1993).

Accordingly, this matter is referred to Appellate Commissioner Peter L. Shaw, who is authorized to hold a telephonic hearing at which he shall engage in a colloquy with appellant regarding the dangers and disadvantages of self-representation on appeal. Appellate Commissioner Shaw is authorized to consider such evidence as he deems necessary and to make findings of fact. See Fed. R. App. P. 48; 9th Cir. Gen. Ord. § 1.8.

Should the Appellate Commissioner determine that appellant wishes to withdraw his request to proceed on appeal pro se and to

EXHIBIT "C"

move for appointment of new counsel, the Appellate Commissioner is authorized to appoint counsel and no further action will be taken by this panel. See 9th Cir. Gen. Ord. § 6.3(e). Should the Appellate Commissioner determine that appellant wishes to continue with his request to proceed on appeal pro se, the Appellate Commissioner shall submit a recommendation concerning appellant's motion to this motions panel for further appropriate action.

The briefing schedule is stayed pending further order of this court.

mocal/6.25.96/wa

April 2, 1999

Supreme Court of The United States
Office Of The Clerk
Gail Johnson, Assistant
Washington, D.C. 20543-0001

Re: Salvador Martinez v. Court of Appeal
No. 98-7809

RECEIVED
APR - 9 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S

Dear Ms. Johnson:

Please find enclosed the original copy of my Reply to Respondent's Opposition. I received Respondent's Opposition on March 24, 1999. I have mailed a copy of my Reply to the Attorney General and the Respondent Court. Please file my Reply with the Court. Thanks You for your consideration and help. May God Bless You and this Court.

Respectfully,
Salvador Martinez
Petitioner In Pro-Se
P-10344 C1-204
Cal. State Prison - LAC
44750 60th Street West
Lancaster, Ca. 93536

P.S.
Please note that the Prison is located in Lancaster, Ca.

Supreme Court, U.S.
FILED
AUG 6 1999
OFFICE OF THE CLERK

(6)

No. 98-7809

In The

Supreme Court of the United States

SALVADOR MARTINEZ,

Petitioner,

v.

COURT OF APPEAL OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of California

JOINT APPENDIX

ROBERT M. FOSTER
Supervising Deputy Attorney General
110 West A Street
Suite 1100
San Diego, CA 92186-5266
(619) 645-2284

RONALD D. MAINES
Counsel of Record
MAINES & LOEB, PLLC
1827 Jefferson Place, N.W.
Washington, D.C. 20036
(202) 223-2817

August 6, 1999

Petition For Certiorari Filed January 15, 1999
Certiorari Granted April 19, 1999

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33 pp

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CHRONOLOGICAL LISTING OF RELEVANT DOCKET ENTRIES

September 3, 1998 – Defendant files timely notice of appeal

October 16, 1998 – California Court of Appeal, Fourth Appellate District, denies defendant's request to represent himself on appeal

October 27, 1998 – Defendant files petition for writ of mandate with California Surpeme Court

November 18, 1998 – California Supreme Court denies petition for mandate

December 29, 1998 – Defendant files petition for writ of certiorari in U.S. Supreme Court

January 14, 1999 – California Court of Appeal, Fourth Appellate District stays defendant's appeal pending ruling by U.S. Supreme Court on petition for writ of certiorari

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SALVADOR MARTINEZ, Defendant and Appellant.	) G024042)) (Super. Ct. No. 98CF1062))) ORDER)) (Filed Oct. 16, 1998)

Appellant's motion to represent himself on appeal is DENIED. (*In re Walker* (1976) 56 Cal.App.3d 225.)

SILLS, P.J.
SILLS, P.J.

S074348

IN THE SUPREME COURT OF CALIFORNIA

SALVADOR MARTINEZ, Petitioner

v.

FOURTH APPELLATE DISTRICT DIVISION THREE, Respondent

THE PEOPLE, Real Party In Interest

(Filed Nov. 18, 1998)

Application for stay and petition for writ of mandate/ prohibition DENIED.

/s/ George
Chief Justice

ORANGE COUNTY PROBATION DEPARTMENT
PRESENTENCE REPORT

(Filed Aug. 24, 1998)

SUPERIOR COURT – DEPT. 44
AUGUST 28, 1998, 9:00 AM

Defendant: MARTINEZ, SALVADOR

AKA: SEE ADDENDUM

Address: 1561 POTOMAC ST., PLACENTIA, CA

Telephone: 714-961-8331

DPO: LINDA STRONG:sb

Court #: 98CF1062

Probation #: A-258208

Present Whereabouts: OCJ

Attorney: IN PROPRIA PERSONA

COURT STATUS

Present Offense: CT 2: 503 PC (FRAUDULENT APPROPRIATION OF PROPERTY OF ANOTHER), FEL.; PENAL CODE SECTIONS 667(d) & (e)(2) & 1170.12(b) & (c)(2); 667.5(b) PC

Off. Date: 4/1/98 **Arr Date:** 4/9/98
Arr Agn: SANTA ANNA P.D.

Filed: INF. 5/26/98 **Guilty by:** JURY
Date: 7/15/98 **Days Custody:** 142
Codefendants: NONE

DESCRIPTION

Age: 50 **Sex:** MALE

DOB: 08/24/1948 **POB:** SAN ANTONIO, TEXAS

Height: 5-10 **Weight:** 170

Hair: GREY **Eyes:** BROWN

Ethnicity: HISPANIC **Arrival in CA:** 1967

Citizenship: U.S. CITIZEN **ID Marks:** NUMEROUS TATTOOS

DMV: CA B8274687 **Expires:** 8/24/02

SSN: 458-74-7089 **CDC:** NONE

FBI: 908121F **CII:** A09450460

OCSO: 719813 **Booking #:** 1809843

EMPLOYMENT HISTORY

Last or Present Employer: LAWRENCE MERRYMAN, SANTA ANA

Date Began: 1/98 **Date Term:** 4/9/98
Reason: ARREST

Type of Work: PARALEGAL
Work Phone: 714-543-1609 **Salary:** $350/WK.

Job Skills Possessed: PARALEGAL. CARPENTRY

Previous Employment

From	To	Employer	Type Work	Salary	Reason
8/94	8/95	WILLIAM FERNSIDE ATT	PARALEGAL	$500/WK.	ARREST
1985	1992	ARNULFO ORTIZ ATT.	PARALEGAL	$750/WK.	ARREST

ADDENDUM

AKAs:

MARINEZ, SALVADOR PINA, JR
MARTINEZ, SALAVDOR
MARTINEZ, SALVADO PINA, JR
MARTINEZ, SALVADOR, JR

MARTINEZ, SALVADOR PINA
MARTINEZ, SALVADORE P
PINNON, SONNY

BIRTH DATES: SOCIAL SECURITY NUMBERS:

No additional . . . 458-47-7089
468-47-7089
468-74-7089

MARITAL HISTORY

Current Spouse **Home Address**
NONE

Occupation: **Employment Address:**

DOB **Date/Place Marriage** **Status**

Phone:

Children	Address	DOB	Sex	Other Parent
SALVADOR MARTINEZ	FRESNO, CA	11/24/67	M	MARY TORRES
CHRISTOPHER	" "	7/11/71	M	" "
MELISSA	" "	11/24/72	F	" "

Previous Spouse **Address**
MARY TORRES FRESNO, CA

Date Married **Date Terminated**
1974 1985

FAMILY DATA

Father: SALVADOR MARTINEZ **Age:** 75
POB: MEXICO **Occupation:** RETIRED
Address: SAME AS DEFENDANT **Phone:** S.A.D.
Mother: MARINA MARTINEZ **Age:** 69
POB: TEXAS **Occupation:** RETIRED

Address: SAME AS DEFENDANT **Phone:** S.A.D.

Brothers/Sisters	Age	Address	Phone	Occupation
VILMA MARTINEZ	55	LOS ANGELES, CA	UNKNOWN	ATTORNEY
LINDA HERNANDEZ	53	CERRITOS, CA	562-926-4322	SERVICE PROCESSOR
ELIZABETH BOND	46	YORBA LINDA, CA	UNKNOWN	MANAGER
JAMES MARTINEZ	40	LOS ANGELES, CA	UNKNOWN	BUSINESS OWNER

Former Residences	From	To
2126 N. CEDAR #C, FRESNO, CA	1994	1995
139 WISEMAN ST., SAN ANTONIO, TX	1985	1992

EDUCATIONAL BACKGROUND

Highest Grade Completed: 12TH

Where: SAN ANTONIO

Degrees Held: H.S. GRAD.

Job Training: SELF TAUGHT PARALEGAL

PERSONAL INFORMATION

Current Health: GOOD

Past Health Problems: BROKEN COLLARBONE 1974, BACK PROBLEMS

Religion: CATHOLIC

Military Record: NONE

Hobbies and Interests: READING

Alcohol: INFREQUENT USE

Drugs: HEROIN, MARIJUANA, COCAINE, LSD, "UPPERS" & "DOWNERS"

Previous Treatment Programs: METHADONE DETOXIFICATION & MAINTENANCE

Year	Vehicle(s) Owned/Model	Color
	NONE	

Firearms Owned/Possessed: NONE

COURT STATUS

On May 26, 1998, an Information was filed in the Orange County Superior Court charging the defendant with violation of the following:

Count 1: Section 487(a) of the Penal Code (Grand Theft), a felony, (victim: Maricela P.).

Count 2: Section 503 of the Penal Code (Fraudulent Appropriation Of Property Of Another), a felony.

It was further alleged that the defendant has previously suffered the following prior convictions of serious or violent felonies, within the meaning of Penal Code Sections 667(d) and (e)(2) and 1170.12(b) and (c)(2):

1. Robbery, in the District Court, County of Bexar, State of Texas, on and about May 24, 1976, case number 75-CR-2948.

2. Aggravated Robbery With Weapon – Gun, in the District Court, County of Bexar, State of Texas, on and about May 24, 1976, case number 75-CR-2950.

3. Aggravated Robbery With Weapon – Gun, in the District Court, County of Bexar, State of Texas, on and about May 24, 1976, case number 75-CR-2949.

It was further alleged as to the above counts that the defendant was previously convicted of the following felonies, and that he then served a separate prison term in state prison for said offense, and that he did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term, within the meaning of Penal Code Section 667.5(b):

1. Forgery, in the District Court, Bexar County Judicial District, State of Texas (case number 76-CR-0941), on or about May 24, 1976.

2. Mailing Threat To Destroy A Building, in the U.S. District Court, Eastern District, (case number 955256), on or about April 29, 1996.

3. Unlawful Possession Of A Controlled Substance, in the District Court, Bexar County Judicial Court, State of Texas, (case number 84-CR-02605), on or about January 28, 1985.

On July 15, 1998, following a jury trial in which the defendant represented himself in propria persona, the defendant was found not guilty of Count 1. He was found guilty of Count 2.

On July 16, 1998, following a jury trial on the priors, the jury found the priors to be true. A probation and

sentencing hearing was set for August 28, 1998 in Department 44, and the Probation Department was ordered to prepare a probation and sentencing report.

COLLATERAL INFORMATION

Records of the Orange County Sheriff's Department Jail (Booking# 1809843) reveal that on May 11, 1998, the defendant was supplementally booked for violation of United States Government Code 18-3148(B) (Violate Release Order) warrant case number CRF95526. There is no bail on this matter.

CIRCUMSTANCES OF THE OFFENSE

Information for this section was obtained from records of the Santa Ana Police Department (DR#98-16339), records of the Orange County District Attorney's Office (DA#98F04921), and a review of transcript of preliminary examination dated May 13, 1998, case 98CF1062, and may not represent exact testimony as heard at trial. On April 1, 1998, Maricela P. contacted the defendant, a paralegal, at the law office where the defendant was employed, requesting information regarding getting her boyfriend bailed out of jail. The defendant advised the victim that $6,000 would be required for the bond. The victim gave the defendant $6,000 in cash. However, bail was never posted, and it was subsequently determined that $6,000 would not have been sufficient for the release of the victim's boyfriend. Circumstances of this matter are as follows:

On March 27, 1998, victim Maricela P. retained Attorney Lawrence Merryman to represent her boyfriend, Sergio Valencia, who was arrested and jailed in Los Angeles County. At that time, Juan Esquival, who was employed as an interpreter and investigator for Attorney Merryman, told the victim that he and Attorney Merryman would be out of town for a few days and that, if she needed any help, to call the office and their paralegal, the defendant, would tend to her needs. It was the victim's understanding that the defendant was to be left in charge of the office.

On April 1, 1998, the victim phoned the defendant, asking about bailing her boyfriend out of jail. The defendant stated that he would help her. The victim gave him the necessary booking information.

A short time later, the defendant phoned the victim. He told her that she would have to get $6,000 in cash for bail. He advised that he had friends in a bail bond office, and could get a good price on the bail collateral.

The victim obtained $3,800 of her own money, then borrowed $1,000 from a friend, and $1,200 from Valencia's employer. Fearful of carrying so much cash around, she had her uncle drive her to Merryman's office. There, she gave the $6,000 to the defendant. He wrote her a receipt, and assured her that Valencia would be out of jail by that night.

When Valencia did not return home and next day, the victim phoned the defendant. She asked what had happened. He told her that he was trying to get the bail reduced, but had not received an answer from the Court. He advised the victim to be patient.

On the morning of April 3, 1998, the victim again spoke with the defendant. He told her that he was going to court at 11:00 a.m. to get the bail reduced, and would call her back. He phoned the victim that afternoon, telling her that he had arranged for Valencia's bail to be reduced to $80,000. The victim asked him if he needed $2,000 more to make ten percent of the $80,000. He replied that he didn't need it.

The victim waited. Again, Valencia was not released. The victim phoned the Los Angeles County Jail, and learned that Valencia's bail was $620,000.

On April 6, 1998, the victim spoke with Juan Esquival, who had returned from vacation. He advised that he did not know anything about the $6,000, and that the defendant acted without his knowledge in taking the money. He stated that the defendant was on Federal Probation, and lived at a nearby motel. When the victim stated that, as Martinez' employer, the law office would be responsible for the $6,000, Esquival told her that it wasn't their problem. He stated that the missing money was an issue between herself, the defendant, and the police. He stated that his office had never received, nor forwarded the bail money to any bondsman, and that no receipt copies documenting the transaction were present in the office.

Attorney Merryman subsequently advised that the defendant had been employed at his office for approximately two months as an office assistant, and that handling money for the purpose of posting bail was not part of the defendant's duties. He reported that the defendant is a "jail house lawyer" who has done some paralegal

work. The attorney commented that he had noticed that the defendant was not completing jobs that were assigned to him, and had "kept an eye on him" for the last several weeks.

On April 9, 1998, investigators determined that the defendant was registered at the Villager Inn. At approximately 10:30 a.m., they knocked on his door. There was no answer. Investigators maintained surveillance on the defendant's room for approximately an hour and 25 minutes. They then observed a female to exit the room carrying baggage. The defendant, also carrying baggage, followed her out of the room. He was taken into custody without incident.

The defendant subsequently waived his Miranda rights. He reported that he is a self-taught paralegal with 25 years experience who has previously worked at approximately 12 different law firms. He advised that, when Attorney Merryman and Esquival left for a trip, he was assigned to tend to the office duties and client matters. He stated that information had not been left with him about who to contact if a client inquired about a bail bond. He reported that, when the victim contacted him, he had used the phone book yellow pages to locate a bondsman willing to accept the bond for Valencia.

The defendant acknowledged having phoned the Los Angeles County Jail, and having learned that the bail for Valencia was $620,000. He further acknowledged having told the victim that she would need $6,000, and having received this money from her, giving her a receipt.

The defendant stated that the bonding company had sent a courier to Attorney Merryman's office. He reported

that he gave the courier the money, and also a receipt for the money. The defendant stated that he could not recall the name of the bonding company.

The defendant provided inconsistent statements regarding the details of his subsequent communications with the victim and the bonding company. He claimed that the bonding company had assured him that the bond had been taken. He further claimed to have left the receipts and "post-it" notes documenting the transaction in the law office.

Subsequent investigation determined that there had never been any attempt to reduce Sergio Valencia's bail of $620,000. During the preliminary hearing on this matter, Juan Esquival testified that he had not been able to locate any paperwork in the office documenting the transaction with the victim, but that a page was missing out of his receipt book. Esquival further testified that his office had never been involved in making bail arrangements for clients, never accepted money for purposes of bail, and routinely referred clients requesting bail information to bail bondsmen. Both Esquival and Attorney Merryman testified that they had not located the victim's $6,000 in their office.

VICTIM'S STATEMENT

A letter was sent to the victim in this matter, Maricela P., requesting her comments. Additionally, attempts were made to contact the victim by phone. As of the date of dictation, a response has not been received. Should information become available prior to the court hearing, it will be forwarded to the Court.

DEFENDANT'S STATEMENT

The defendant was interviewed at the Orange County Jail. In regard to this matter, he states:

> "I maintain my innocence. I didn't steal the money. I feel that one of the workers there – Juan Esquival – is the person who actually took the money. That was my defense [in the trial]. I feel that gentleman [Esquival] is one of the biggest con men [there is].
>
> "The reason that I chose to go "pro per" is that I knew there wasn't an attorney on earth who'd believe me once he saw my past [criminal record]. And I did the best I could to try to prove my innocence. That money was left there at the office."

The defendant acknowledges having a lengthy prior criminal history, which he attributes to his long-time, severe heroin addiction. He states that he has refrained from the use of heroin since 1994. In regard to the instant matter, he comments:

> "This case here is really something, even my history . . . [indicates I wouldn't do it]. If I had committed some wrongful act, I think I'd have taken the best deal [I could receive] and run with it. But I can't. I just can't."

In regard to a sentence for this matter, the defendant states that he does not believe any sentence is appropriate, as he believes that he is innocent. He has received new information since his trial, which he believes will demonstrate his innocence. He plans to make a motion for a new trial, and will provide this new information to the Court.

The defendant indicates that it is troubling to him to be again involved in the criminal justice system, when, for the first time in his adult life, he had been able to stay off heroin. He reports:

> "I was clean and I loved it. I loved every minute of it."

STATEMENTS OF REFERENCES AND INTERESTED PARTIES

Deputy District Attorney Tamara Jacobs, the prosecutor in the instant matter, advised in a phone conversation that she believes the defendant's potential sentence of 28 years to life is an appropriate disposition and sentence for the instant offense. District Attorney Jacobs advises the following regarding the defendant:

> "He has an extremely long history of violent crimes including armed robberies and a threat to bomb a building. Two of his robberies, that were armed with a gun, were against the same victim. He obviously preys upon people's weaknesses."

The District Attorney advises that the defendant is "a very intelligent man." She expresses the opinion that he has the capacity and the sophistication to think about the consequences of his actions. In regard to the instant matter, she states:

> "He embezzled money from somebody who was very concerned because their loved one was in custody. I think he shows that he has the intelligence and sophistication to plan these crimes.

> "Every time he has been released, he has committed another crime. He is not an active participant for good purposes to society, and I think society needs to be protected. He has not displayed any remorse for his conduct."

The defendant's sister, Linda Hernandez, in a phone conversation, advised that, before becoming involved in the instant matter, the defendant was "doing wonderful." She states that he was working and "was being functional."

Linda Hernandez had not been aware that the defendant was being charged under the "three strikes" statute. She expresses the opinion that this statute should not be used in the instant case, stating that the defendant presently is "absolutely not a danger to anyone." She acknowledges, "When he was an addict, there was difficulty with his making correct choices."

Ms. Hernandez reports that there was a change in the defendant in approximately 1992. She reports that, since that time, the defendant has been "a good brother and a good son," as well as being "a really good father" and playing "a closer role to his family." He had spent a lot of time with his parents. Ms. Hernandez notes that their father is presently in the hospital, severely ill with emphysema, and this, combined with the defendant's current legal situation, is placing stress upon the family.

Ms. Hernandez expresses the opinion that the defendant's past criminal history does not have anything to do with his present situation. She believes that he could be satisfactorily maintained in the community on formal probation.

The defendant's sister, Elizabeth Martinez Bond, submitted a letter in which she expresses the opinion that the defendant is not a threat to society, and that the "three strike" law should not be considered in his case for the following reasons:

> "He has been off drugs for numerous years. He is now very much involved and concerned with the well-being of his family. He has the training and skill to maintain a constant income. His past situations are behind him, [he] holds no grudges, and would like to move forward with a productive life; crime-free, drug free, and also be a law-abiding citizen."

Phone messages were left for the investigating officers in the instant matter, requesting their comments. As of the date of dictation, responses have not been received. Should information become available prior to the court hearing, it will be forwarded to the Court.

PRIOR RECORD

Record checks with the Department of Justice Bureau of Criminal Identification and Information, as well as automated Federal Bureau of Investigation and Interstate Identification Index records, records of the State of Texas, of the Orange County District Attorney's Office, and records of the United States District Court, Eastern District of California (Docket# CR-F-95-05256OWW), reveal the following record for the defendant:

Date	Agency	Offense	Disposition
1-23-67	U.S.D.E.A. – San Antonio PD	Dangerous Drugs – Narcotics Law	5 yrs probation.

9-23-75	San Antonio PD	Felony Robbery – Threats	Filed 75-CR-2948, 5-24-76 20 yrs prison; discharged from prison Nov. 1981.

According to records of the United States District Court, on September 23, 1975, the defendant drove up to a Photomat drive-thru. He advised the female attendant he had a gun and wanted her money. The attendant asked to see the gun. The defendant refused, but insisted he had one. The attendant gave him $27, at which time the defendant left.

9-25-75	San Antonio PD	Robbery – Aggrav. W/Deadly Weapon	Filed 75-CR-2950, 5-24-76 pled guilty, 5-20 yrs state prison.

Records of the 144th Judicial District Court, Bexer County, Texas reveal that the victim on this matter was Donna Geller, and that the defendant used a gun in committing the robbery.

10-11-75	San Antonio PD	Robbery – Aggrav. W/Deadly Weapon	Filed 75-CR-2949, 5-24-76 20 yrs prison; paroled 12-6-83.

According to records of the United States District Court, on October 11, 1975, the defendant entered a bar with a small handgun. He ordered the bartender and witnesses behind the bar. He directed the bartender to give him "all the money," and was handed $158. He then

ordered the witnesses into the men's bathroom, tied the door handle shut, and left. He was arrested on October 15, 1975, and admitted he had been involved in three robberies at the same bar. The victim in this matter was Donna Geller.

1-29-76	San Antonio PD	Felony Forgery	Filed 76-CR-0856, 5-24-76 10 yrs prison.

Records of the United States District Court reveal that the defendant forged a check in the amount of $150.

2-23-76	San Antonio PD	Felony Forgery	Filed 76-CR-0941, 5-24-76 pled guilty, 10 yrs prison.

Records of the United States District Court reveal that the defendant forged a check in the amount of $140.25.

6-25-76	United States Marshal – San Antonio	Threaten Life of U.S. District Judge	11-17-76 conv., 12-9-76 sent. 5 yrs custody.

According to records of the United States District Court, the defendant wrote a letter to a U.S. District Judge in Texas, threatening to blow up the Federal Building.

6-7-84	San Antonio PD	Felony Poss. Of Cont. Subs. – Heroin Under 28 Grams	Filed 84-CR-2605, 8-29-85 pled nolo contendre, 10 yrs prison, rel. on 10 yrs. prob.; 3-17-86 found in viol., prob. revoked, imposed 10 yrs prison.

United States District Court records reveal that the defendant was found in possession of one balloon of heroin, after being observed by police officers to make a drug transaction. He was paroled May, 1989, and was returned to prison subsequently several times for violating parole.

11-4-91	Santa Ana PD	487(1) PC (Grand Theft)	Legal motion granted, dismissed 9-19-96.

According to records of the Santa Ana Police Department (DR# 91-66710), on November 1, 1991, Rose Hernandez reported that the defendant, her brother, had borrowed her vehicle from her to drive to his methadone detoxification center. He was to return the vehicle within an hour. When, after a day, he had not done so, Hernandez reported the vehicle stolen.

Hernandez advised that the defendant is a drug user who frequented the Myrtle Street area. She went to the area checking for her car, knowing that the defendant

might be in the area buying drugs. She located the vehicle, and learned that, under false pretenses, he had sold it to Salvador Figueroa. Figueroa confirmed that the defendant had sold him the vehicle for $760, providing a pink slip which Hernandez had left inside the vehicle.

5-11-92	San Antonio PD	Aggrav. Assault Deadly Weapon – Non-Family	10-14-92: 180 days jail.

United States District Court records reveal that on May 11, 1992, the defendant pointed a shotgun at victim Angelina M. and threatened to kill her.

8-29-95	United States Marshal	18 USC 844(e) (Mailing Threat To Destroy A Building)	Filed CR-F-95-05256, 25 mos. w/36 mos. supervised release.

According to United States District Court records, on August 25, 1995, the defendant wrote and mailed a letter to the Chief United States District Court Judge, Eastern District of California, addressing the judge by name, threatening to blow up the Federal Building in Fresno. The text of the letter is as follows:

> "The laws of the state are so harsh, disproportionate to offenses, violate the eighth amendment of the United States Constitution and the ex-post facto clause of Article I, Section 10, of the U.S. Const. If this Federal Court does not declare the enhancements sections of the Penal Code "unconstitutional," I will cause the same explosion on this Federal Building as the Federal Building in Oklahoma City. I will blow up

> this Federal Courthouse building in Fresno in protest of the laws enacted in the Penal Code. I am not playing hide-and-seek, and I am being open as to my intentions and expressing my rights and views."

The defendant signed the letter, and provided his address. On August 29, he was contacted by FBI and U.S. Marshal agents, and acknowledged having written and mailed the letter. He was arrested at that time, and a search of his residence revealed nothing significant.

During an interview in April of 1996 for the federal presentence investigation report, the defendant admitted having written the letter, stating that he did so because he wanted to protest the constitutionality of the three strikes law. He stated that this law primarily affects the minority population, and he wished to challenge it. He further indicated that he knew he was going to be arrested, and believed he had to be incarcerated to litigate the issue.

The defendant also reported that he had a heroin habit costing approximately $100 a day. He acknowledged that his addiction to heroin, and the fact that he was using so much of it, may have been another reason he wanted to be incarcerated. He advised that he would like the Court to know he never intended to blow up the Federal Building, and is not a violent man.

In the federal presentence investigation report, the investigating U.S. probation officer advised the following:

> "There is no evidence to suggest the defendant could carry out his threat to 'blow up' the Federal Building. When his home was searched, no chemicals, dynamite, etc., was found. Also,

there is no information to indicate the defendant has had any training or special skills in this area."

The defendant presently declines to comment specifically on his prior convictions, as these matters have been alleged as enhancements on the Information in the instant case. However, he did report that his prior "strikes" are "remote in time." He states, "As far as violent priors, they occurred in the 1970s."

The defendant made the following general statement regarding his prior criminal record:

"That was my prior record, my addiction [to heroin]. That's what led me to do that [the crimes]."

The defendant states that, after he was released from prison on his sentence for the robberies, he ceased committing violent crimes. He also points out that, in the robberies, "No-one was hurt."

DMV History

A record check with the State of California Department of Motor Vehicles reveals that the defendant has not been issued a California driver's license. His identification card expires August 24, 2002. He does not have any departmental actions, convictions, failures to appear, or accidents.

ADJUSTMENT IN CUSTODY

Records of the Orange County Sheriff's Department Jail (Booking# 1809843) reveal that the defendant has

been incarcerated on this matter since April 9, 1998. He has one minor violation of jail rules for possession of contraband (having a torn towel in his cell).

PROGRESS ON PROBATION

Records of the 144th Judicial District, Bexar County, Texas reveal that on August 29, 1985, the defendant was released on probation. On March 17, 1996, he was found in violation of probation, probation was revoked and the defendant was committed to prison. His probation violations consisted of his having been unsatisfactorily terminated from the Trexan Program, and failing to report weekly to probation.

Records of the Federal Bureau of Investigation reveal that on June 18, 1996, the defendant was received at the Federal Correctional Institution at Terminal Island. On May 23, 1997, he was placed on supervised release status, United States Probation Office Sacramento. His case is presently assigned to Federal Probation Officer Rick Laiviere in the Fresno office. Officer Laiviere advises that he has only seen the defendant on one prior occasion. Prior to the defendant's arrest on the instant matter, the defendant had been supervised by the Santa Ana Federal Probation Office.

Following his arrest on the instant matter, his case was returned to the Fresno office.

The defendant reports that his supervising officer in Santa Ana was John Ingram, and that he had been doing

well on probation. Attempts were made to contact Probation Officer Ingram. It was learned that the officer recently retired, and is not available for contact.

SOCIAL HISTORY

Information for this section was obtained from an interview with the defendant, and from records of the United States District Court Presentence Investigation Report prepared for sentence date April 29, 1996. The defendant is the third of the five children born to the marriage of his parents in the City of San Antonio, Texas. He has resided for the majority of his life in San Antonio, but has also, periodically, lived in California, primarily in the Los Angeles area.

The defendant reports that he had a happy childhood, and was never the victim of physical or sexual abuse. His father drank alcohol heavily, but has now been sober approximately seven years. The defendant denies that domestic violence occurred in his parents' home, stating that his father yelled a lot, but was not physically violent.

The defendant received average grades throughout his childhood, and graduated from high school. He reports that he was not active in sports or music. He worked a lot with his father, who supported the family but his builder-contractor business. Comments the defendant, "I can build a house from the ground up." The defendant's mother was a homemaker. The defendant recalls that he was a quiet child.

The defendant began marijuana use at the age of 13. He comments, "I got into it pretty good." Within a few months, the defendant was smoking marijuana everyday.

After graduating from high school, the defendant continued working with his father in carpentry. At the age of 19, he was introduced to the intravenous use of heroin by a friend. He recalls that, within weeks, he was addicted to heroin.

The defendant reports that he made numerous attempts over the years to refrain from the use of heroin. He states,

> "All the thirty some years that I was a heroin addict, I never could really kick the habit. I was never able to kick on my own. I'd always have to seek a program to help me kick."

The defendant reports that, in 1994, he made a commitment to no longer use heroin. He presently states that he has been "clean" since that time.

Records of the United States District Court indicate that in April of 1996, the defendant reported that he had been using heroin, injecting approximately $100 worth of the drug a day.

District Court records also indicate that the defendant has previously used cocaine, LSD, and "uppers" and "downers". He has been in and out of drug treatment programs throughout his adult life. The defendant acknowledges having repeatedly participated in the methadone detoxification and maintenance programs.

The defendant presently states that he has been legally married on one occasion and has three adult children from that marriage. District Court records report that he has been married three times and has a total of four adult children. He is presently divorced. Prior to his arrest in August of 1995, he had been living with his son Christopher in the Fresno area.

The defendant advises that he presently has a girlfriend, 26-year-old Donna Telles. According to the defendant, Ms. Telles works as a legal secretary-office help, but is currently unemployed.

The defendant has worked off and on as a paralegal since approximately 1990, having apparently developed his legal expertise by studying law books in prison.

DISCUSSION AND EVALUATION

CIRCUMSTANCES IN AGGRAVATION

The Crime

421(a) – 11 The defendant took advantage of a position of trust or confidence to commit the offense, in that he had been left in charge of a law office, and the victim, whose boyfriend in jail was a client of the law office, turned to the law office, represented by the defendant, for assistance in obtaining the release of her boyfriend.

The Defendant

421(b) – 4 The defendant was on Federal probation when he committed the crime.

421(b) – 5 The defendant's prior performance on probation and parole in the State of Texas was unsatisfactory.

CIRCUMSTANCES IN MITIGATION

The Crime

423(a) – There do not appear to be any circumstances in mitigation relating to the crime.

The Defendant

423(b) – There do not appear to be any circumstances in mitigation relating to the defendant.

PROBATION ELIGIBILITY

413(a) – The defendant has been convicted of violation of Penal Code Section 503, and the Penal Code Section 667(d) and (e)(2) allegations have been found to be true. Therefore, probation is prohibited by Penal Code Section 667(c)(2).

EVALUATION

The Court has for consideration a 50-year-old defendant with a lengthy prior criminal history who, in the instant matter, took advantage of the opportunity presented to him by being essentially in charge of a law office, to falsely appropriate the property of the victim. The defendant, a self-taught paralegal, has a lengthy history of heroin addition. He reports that his prior criminal history has resulted from this addition, apparently

indicating that he committed crimes for economic gain in order to support his heroin habit.

The defendant presently insists that he has been sober since 1994. However, United States District Court records indicate that, at the time the defendant threatened to blow up the Federal Building in Fresno in 1996, he had an intravenous heroin habit which cost him approximately $100 a day. In the prior matter in which the defendant's sister alleged that the defendant had falsely appropriated her vehicle, selling it, she also advised that the defendant was frequenting an area known for a high level of narcotics activity, and might be going there to purchase drugs.

Given these factors, it is considered possible that the defendant may have relapsed into heroin use, before he committed the instant matter. It is noted that his employer, Attorney Lawrence Merryman, indicated to an investigating police officer that he was watching the defendant, prior to the attorney's leaving on a trip, and the defendant committing the instant matter. It is suspected that there may be additional emotional factors which led the defendant to commit the instant matter, factors pertaining to resentment regarding his personal situation, unresolved angers, and dependency needs. Whatever the cause of the defendant's conduct in the instant matter, it is noted that he was apparently an experienced paralegal, who clearly would have known his conduct was wrong.

The defendant is statutorily ineligible for probation supervision. Additionally, given his lengthy criminal history and prior unsatisfactory performance on probation,

he is seen as being inappropriate for probation supervision. Consequently, it will be recommended that probation be denied.

RECOMMENDATION

In view of the foregoing, it is respectfully recommended that probation be denied and sentencing imposed. Further, the defendant be ordered to pay a restitution fine pursuant to Section 1202.4(b) of the Penal Code, in the amount of $1,000.

Respectfully submitted,

MICHAEL SCHUMACHER
Chief Probation Officer

/s/ Linda D. Strong
Linda D. Strong
Deputy Probation Officer
569-2096 JS

Dated this 28th day of August, 1998.

I have read and considered the foregoing report of the Chief Probation Officer.

/s/ Daniel S. Illegible
JUDGE OF THE SUPERIOR COURT

LDS:sb

AUG 6 1999

No. 98-7809

In The

Supreme Court of the United States

SALVADOR MARTINEZ,

Petitioner,

v.

COURT OF APPEAL OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of California

BRIEF FOR THE PETITIONER

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August 6, 1999

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QUESTION PRESENTED

Does a criminal defendant have a constitutional right to elect self-representation on direct appeal from a judgment of conviction?

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Order of the Court of Appeal of the State of California, Fourth Appellate District, Division Three, denying Petitioner's motion to represent himself on appeal, is unreported. It is reproduced at J.A. 1. The Order of the Supreme Court of California denying Petitioner's application for writ of mandate, also unreported, is reproduced at J.A. 2.

JURISDICTION

The judgment of the Supreme Court of California was entered November 18, 1998. The petition for writ of *certiorari* was filed on December 28, 1998, and was granted on April 19, 1999. This Court set for July 1, then extended to August 6, 1999, the deadline for submission of Petitioner's brief on the merits. The jurisdiction of this Court rests on 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the Constitution of the United States provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

2. The Fourteenth Amendment, Section 1, provides: " * * * Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws."

STATEMENT

1. *Trial; Notice of Appeal.* Salvador Martinez was convicted in California state court of the fraudulent appropriation of the property of another in violation of the California Penal Code. Throughout the trial, Mr. Martinez represented himself. He filed a timely notice of appeal on September 3, 1998. On October 16, his request to proceed *pro se* on appeal was denied by the California Court of Appeal in a one sentence Order, the court citing *In re Walker*, 56 Cal. App. 3d 225 (1976) as the authority for its ruling. J.A. 1.

2. *California's System for Appointment of Appellate Counsel.* Rule 470 of the California Rules of Court requires trial courts at the time of judgment and sentencing to advise defendants convicted at trial of their appellate rights, including the right of an indigent defendant to have counsel appointed by the reviewing court. In the case of an indigent defendant, the trial attorney has a statutory duty to file a timely notice of appeal when the attorney believes that meritorious grounds exist for a reversal or modification of the trial court's judgment.

In the Fourth Appellate District, the appointment of counsel on appeal is administered through Appellate Defenders, Inc. (ADI), an independent agency which performs administrative functions in connection with the appointment of appellate counsel. Pursuant to Rule 76.5(d) of the California Rules of Court, the appellate

court is relieved of the duty of assuring the quality of appointed counsel under the guidelines of the Standards of Judicial Administration, because the qualified attorneys in ADI are required to consult with and assist appointed counsel concerning the issues on appeal and appellant's opening brief.

3. *The Rationale of Walker.* The California appellate court did not articulate a rationale for denying Mr. Martinez' motion to continue to represent himself on appeal, as he had at trial. The court instead rested its ruling on the vitality of *In re Walker, supra*, a 1976 case holding that a defendant does not have a constitutional right to this effect. *Walker* is a succinct decision whose argument has the following structure: *(1)* An appeal from a state court judgment of conviction is not itself "a matter of absolute right" – *i.e.*, is not constitutionally based – but exists only by dint of state "provisions allowing such appeal," *id.* at 227; *(2)* for this reason, the "scope and authority [of the statutory right to appeal] is only as specifically delineated" by the State, provided this does not violate due process or equal protection, *id.* at 227-28; *(3)* neither of these factors is implicated with respect to a purported right to self-representation on appeal; *(4) therefore*, the State is free to dictate that no such right exists, and may appoint counsel over a defendant's objections.

California's appellate court recently affirmed *Walker* in *People v. Scott*, 64 Cal. App. 4th 550 (1998). Although *Scott* is the more detailed analysis, its essential logic is identical to that of *Walker*. *Scott* did, however, explicitly urge two key propositions that are only implicit in *Walker*: *(1)* Because the right to counsel historically has been closely linked to fairness, "[t]he due process right to

a fair appeal would be hindered by establishing a right to self-representation on appeal." *Id.* at 561. Thus, a State court's "duty to ensure that appellants receive a fair appeal" effectively *requires* the imposition of counsel; *(2)* "the administrative burden of allowing self-representation" overrides a defendant's putative interests on this score. *Ibid.*[1] These features of the *Walker/Scott* approach to self-representation – which any argument of like structure is logically committed to – has implications that are wholly untenable in light of this Court's right to counsel jurisprudence.

SUMMARY OF ARGUMENT

In my school days, when I had lost one shaft
I shot his fellow of the self-same flight
The self-same way, with more advised watch
To find the other forth, and by adventuring both
I oft found both. I urge this proof.
– The Merchant of Venice
Act I, Scene i

Like the technique employed by Shakespeare's Bassanio in *The Merchant of Venice* – who reckoned the location of one "lost shaft" by tracing its flight with a second shot "the self-same way" – the constitutional stature of the right to elect self-representation on direct

[1] The analysis in *Walker* is typical of the rationale relied upon by other courts, state and federal, which have reached the same conclusion. See, e.g., *Callahan v. State*, 354 A. 2d 191 (Md. App. 1976); *Hill v. State*, 656 So. 2d 1271 (Fla. 1995); *United States v. Gillis*, 773 F. 2d 549 (4th Cir. 1985); *Lumbert v. Finley*, 735 F. 2d 239 (7th Cir. 1984).

appeal can be found among the array of related rights the Court already has delineated in its numerous assistance of counsel cases. The legitimacy of a right to self-representation is established in two ways. *First*, its existence is conceptually necessary when we consider the overall framework of the Court's pattern of decisions. These cases establish beyond cavil that the stage at which the instant case presents itself – direct appeal of right – falls within a carefully delimited set of decisions specifying the procedural stages at which the Court has determined that a right to counsel is required by due process because a defendant's liberty interest is sufficiently substantive. Opposing arguments that would discount the value of that interest on the grounds that "there is no constitutional right to appeal" or "the stages of trial and appeal are dispositively different" rest on a mistaken interpretation of the analytical principles by which the Court's precedents hang together coherently. Once the precise bounds marked by that set of decisions are in view, the right to self-representation follows correlatively, as do many constitutional rights whose origin and scope are determined by resort to structural analysis. *Moreover*, the right to elect self-representation on first appeal cannot be denied except by doing violence to the logical integrity of the framework of the Court's decisions.

ARGUMENT

THE RIGHT TO ELECT SELF-REPRESENTATION ON DIRECT APPEAL OF A CRIMINAL CONVICTION IS OF CONSTITUTIONAL STATURE.

I. Introduction; Analytical Parameters.

As with most cases involving the derivation and scope of constitutional rights, the right at issue in this case cannot be specified *a prior*, in a vacuum of conceptual space. When the Court identifies a constitutional right applicable to the States through the Fourteenth Amendment, that Amendment's due process predicate – being open-textured – calls for careful specification of the right within the constellation of the Court's relevant precedents; the coherent fixing of the right in the context of related rights comprising the Court's evolving jurisprudence in the area.

Because "[t]he precise content of constitutional rights almost invariably turns on the context of fact and law in which they arise," *Schlesinger v. Councilman*, 420 U.S. 738, 755 (1975), a principled approach to precedent extends logically the rationales that motivate prior holdings. In Justice Cardozo's words, this achieves "the primacy that comes from natural and orderly and logical succession. Homage is due to it over every competing principle that is unable by appeal to history or tradition or policy or justice, to make out a better right." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 31-32 (1966).

Thus, although the Court ordinarily does not identify a previously unarticulated constitutional right merely by inferring it from an already established right – *see, e.g., Faretta v. California*, 422 U.S. 806, 819 n.15 (1975) ("The

inference of rights is not . . . a mechanical exercise") – the overall logic or structure of the existing array of related rights, together with the rationalizing principles by which they cohere, are often key for assessing whether the right in question is of constitutional dimension. The Court by this legitimate method is able "to identify [a] source of constitutional value . . . in the logical implications of a system that recognizes both individual liberty and democratic order." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 791 (1986) (White, J., joined by Rehnquist, J., dissenting). Of course, this reliance on analytical consistency is all the more important when controversy over the right in question may not easily be enlightened by other familiar approaches – for example, recurrence to English or Colonial legal history – because concern over the right is principally an outgrowth of modern-era case law. The "attempt to use history to take [us] where legal analysis cannot" may thus "create[ ] more questions than it answers." *Faretta v. California*, 422 U.S. 806, 843-44 (1975) (Rehnquist, J., dissenting). The logical implications of extant constitutional rights therefore have a "primacy" (CARDOZO, *supra*) that must be countenanced in the disposition of future cases.

Two further pre-cautions help ensure the validity of constitutional adjudication of this type. *First*, contradictions or inconsistencies in the pattern of the Court's precedents – tears in the fabric of otherwise coherent principles – appear when the analytical extension has gone awry because it has gone too far. "Despite the tendency of all rights 'to declare themselves absolute to their logical extreme,' there are obviously limits beyond which the . . . analysis may not be pressed without doing

violence to principles recognized in other decisions of this Court." *Ross v. Moffitt*, 417 U.S. 600, 611-12 (1974) (quoting *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908). *Second*, anomalies can result when the original context of an invoked principle is neglected or forgotten. "[T]he same constitutional principle may operate very differently in different contexts . . . [S]hoehorning new problems into a test that does not reflect the special concerns raised by those problems tends to deform the language of the test." *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring in part, concurring in the judgment). If a competing line of reasoning exhibits either of these features – incongruence or the dislodging of a principle from its factual mooring – the argument's viability is doubtful.

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This dynamic – the reasoned extension and limitation of doctrinal principles – has been especially visible in the Court's decisions involving the right to counsel *vel non*, including the right to self-representation. The "right to representation" decisions are a bundle of interrelated precedents which today mark the limits of several associated constitutional rights, among them the right to counsel at trial and on direct appeal, waiver of the right to counsel, and the right to self-representation at trial. The Court's holdings in these cases are unified by the principle that a defendant's due process interests are of a fundamental nature (and thus constitutionally protectable) through a progression of procedural stages of which direct appeal is the last. Beyond that key juncture the discretion of the State in implementing its criminal processes is ordinarily

accommodated, as long as it is rational. But for cases that fall into the well-defined set of circumstances where the Court finds due process protections in play, such as direct appeal of right, the interests of the State are secondary to those of the defendant, and neither the State's own view of the requirements of "fairness" nor its invocation of utilitarian goals can defeat a defendant's constitutional claim.

We show below that the right to elect self-representation on direct appeal is necessarily implicit within this framework of related rights; and that, conversely, if we were to assume *ex hypothesi* that the right to self-representation does *not* exist and that a State may, in the name of due process or social utility, force counsel on a defendant at the direct appeal stage, fatal incongruencies weaken that framework.

II. Background Cases: The Fabric of the Court's Jurisprudence in Right to Counsel Cases.

The analysis of the issue in the instant case cannot be conducted apart from the harmonizing principles that emerge from and control prior decisions of the Court construing the nature and scope of the right to counsel *vel non*. A review of the *ratio* of the cases shows that the variety of "right to representation" issues are fundamentally interrelated. Within the procedural boundaries staked out by the Court's precedents – boundaries which indisputably extend from arraignment to trial to direct appeal of right – we find a characteristic logic employed, a genuine consistency of analysis. Moreover, underlying the pattern of holdings within that fixed domain are

consistent assumptions about the nature of such rights: They inhere in the individual; they have a core element of personal choice; they can be intelligently waived; they cannot be overridden by interests of social utility.

1. *Powell v. Alabama*, 287 U.S. 45 (1932), was the first occasion in which the Court held that the Due Process Clause required the appointment of counsel by state courts for indigent defendants in those cases in which lack of representation by counsel would result in an unfair trial. The Court did not rule in *Powell*, however, that the assistance of counsel clause of the Sixth Amendment was applicable to the States. Rather, the Court held only that the Fourteenth Amendment's Due Process Clause required fair trials for state criminal defendants, and that in some cases a fair trial could not be obtained unless the accused were offered the assistance of counsel. After the *Powell* decision, the Court thus followed the rule that the Due Process Clause required state courts to appoint counsel for indigent defendants in capital cases, but that appointed counsel in noncapital state cases was required only if an unfair trial would result.

In *Gideon v. Wainwright*, 372 U.S. 335 (1963), however, the Court held that the Fourteenth Amendment's Due Process Clause required the appointment of counsel for indigent defendants facing serious criminal charges in all state cases, capital or noncapital. This brought the rule governing the right to counsel in state courts into conformity with the rule applicable in the federal courts under the Sixth Amendment. The *Gideon* case is regarded as having incorporated the assistance of counsel clause of the Sixth Amendment into the Fourteenth Amendment, making it applicable to the States, an expansion of the

constitutional right to counsel that began with the Court's decision in *Powell*.

Over time, the Court interpreted the Sixth Amendment counsel clause expansively, first by adding a requirement to provide counsel, and second by specifying the stages where the offer of counsel is necessary. The view evolved that a State may not incarcerate a person, whether he is indigent or not, if he has not had (or waived) the assistance of counsel at all stages of the criminal process at which his substantial rights may be affected. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). The proper resolution of the present case requires attention to this second element: the extent to which a case's procedural stage – here, direct appeal – affects the nature of the defendant's constitutional interest.

2. *Appeals of Right*. The Court traditionally has held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors. *McKane v. Durston*, 153 U.S. 684 (1894). However, if a State has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U.S 12, 18 (1956), the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.

In *Griffin*, the State conditioned full direct appellate review, review as to which all convicted defendants were entitled, on the furnishing of a bill of exceptions or report of the trial proceedings, in the preparation of which the

stenographic transcript of the trial was usually essential. Only indigent defendants sentenced to death were furnished free transcripts; all other convicted defendants had to pay a fee to obtain them. The Court held that the State must provide a transcript to indigent criminal appellants who could not afford to buy one if that was the only way to assure an "adequate and effective" appeal. 351 U.S. at 20.[2]

Justice Black's opinion for the *Griffin* plurality is instructive. Rejecting the argument that the post-trial posture of the case *eo ipso* was determinative in favor of the State, he reasoned in two steps: *First*, "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial." *Second*, "[t]here is *no meaningful distinction* between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the

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[2] See also *Eskridge v. Washington State Board of Prison Terms and Paroles*, 357 U.S. 214, 215 (1958) (per curiam) (invalidating state rule giving free transcripts only to defendants who could convince trial judge that "justice will thereby be promoted"); *Burns v. Ohio*, 360 U.S. 252 (1959) (invalidating state requirement that indigent defendants pay fee before filing notice of appeal of conviction); *Lane v. Brown*, 372 U.S. 477 (1963) (invalidating procedure whereby meaningful appeal was possible only if public defender requested a transcript); *Draper v. Washington*, 372 U.S. 487 (1963) (invalidating state procedure providing for free transcript only for a defendant who could satisfy the trial judge that his appeal was not frivolous).

poor an adequate appellate review accorded to all who have money enough to pay the costs in advance." *Ibid.*

The link between the counsel right at the trial stage and the stage of first appeal is a valid one, even though "[i]t is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." *Griffin*, 351 U.S. at 17-18. From that proposition, it did *not* follow that "a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant." *Ibid.*

Subsequently, in *Douglas v. California*, 372 U.S. 353 (1963), the Court held that the right to counsel is one of the safeguards guaranteed by the Fourteenth Amendment where a criminal defendant pursues a first appeal as of right. During this period, other decisions of the Court reiterated the constitutional significance of this initial stage of appeal in criminal proceedings. For example, in *Swenson v. Bosler*, 386 U.S. 258 (1967), the Court held that an indigent criminal appellant was entitled to "[t]he assistance of appellate counsel in preparing and submitting a brief to the appellate court . . . on the only appeal which the State affords him as a matter of right." *Id.* at 259. In establishing a system of appeal as of right, "the State had implicitly determined that it was unwilling to curtail drastically a defendant's liberty unless a second judicial decision maker, the appellate court, was convinced that the conviction was in accord with law." *Ibid.* Direct appeal was deemed "the final step in the adjudication of guilt or innocence of the individual," *ibid*, and the

very fact that a State had created a right of appeal implied the State's recognition of the significance of the liberty interest at stake.

The prospect of the Court's ultimately identifying the post-trial procedural stage beyond which a defendant's constitutional interests would *not* warrant the offer of counsel arrived in *Ross v. Moffitt*, 417 U.S. 600 (1974), where the Court considered whether the *Douglas* right to appointment of counsel on first appeal should be extended to require counsel for discretionary state appeals and for applications for review in the Supreme Court. *Per* then-Justice Rehnquist, the Court held that appointment of counsel at these stages was not required. The Court began by observing that, broadly speaking, "there are significant differences between the trial and appellate stages of a criminal proceeding," 417 U.S. at 610, but it quickly refined that categorization. In *Ross*, the defendant had received the benefit of counsel in examining the record of his trial and in preparing an appellate brief for the court of appeals. But procedural stages *beyond* direct appeal were of a *different* sort: The Court thus rejected the notion that a defendant on discretionary appeal is denied "meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court." 417 U.S. at 615.

Ross is instructive for two reasons. *First*, it demarcates an upper procedural bound in the Court's right to counsel cases. Beyond first appeal of right, the fundamental guarantees of the Fourteenth Amendment do not require a State to offer counsel to an indigent defendant. By contrast, between the stages of arraignment and direct

appeal, the nature of the defendant's interest is such that the opportunity for counsel's assistance, if sought, is constitutionally required.

Second, the *Ross* decision, while recognizing the procedural realities differentiating the trial from appellate stages generally, grouped "first appeal of right" with the *earlier* stages of a criminal prosecution, and thus marked the chief distinction in play as the one between direct appeal and discretionary appeal. Thus, said the Court, "[t]he suggestion that a State is responsible for providing counsel to one petitioning this Court simply because it initiated the prosecution which led to the judgment sought to be reviewed is unsupported by either reason or authority. It would be quite as logical under the rationale of *Douglas* and *Griffin*, and indeed perhaps more so, to require that the Federal Government or this Court furnish and compensate counsel for petitioners who seek *certiorari* to review state judgments of conviction." *Id.* at 617-18. To the contrary, "this Court has followed a consistent policy of denying applications for appointment of counsel by persons seeking to file jurisdictional statements or petitions for *certiorari* in this Court. * * * In the light of these authorities, it would be odd, indeed, to read the Fourteenth Amendment to impose such a requirement on the States, and we decline to do so." *Ibid.*

Eleven years after *Ross*, in *Evitts v. Lucey*, 469 U.S. 387 (1985), the Burger Court further elaborated the nature and scope of the individual right at stake in a direct appeal, holding that a State cannot penalize a criminal defendant by dismissing his first appeal as of right when his appointed counsel has failed to follow mandatory appellate rules. The rationale of *Evitts* is notable for its

portrayal of the unavailing arguments of the State of Kentucky, which had pressed two points relevant to the instant case.

First, Kentucky invoked the traditional rule of *McKane v. Durston*, *supra*, that a State need not, in the first instance, establish *any* system of appeals as of right. This proposition, thought Kentucky, would sustain the weight of a broader claim – in this case, that the State's discretion to administer its appellate system was largely unencumbered, overriding a defendant's interest in effective assistance on direct appeal.

The Court rejected this argument. The right to direct appeal would be "unique among state actions" if it could be conditioned without consideration of applicable due process norms. 469 U.S. at 401-03. By analogy, said the Court, "although a State may choose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause," *ibid.*, *citing Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). Likewise, "a State has great discretion in setting policies governing parole decisions, but it must nonetheless make those decisions in accord with" due process. *Ibid.*, *citing Morrissey v. Brewer*, 408 U.S. 471, 481-484 (1972). "In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the . . . Due Process Clause." *Ibid.* Accordingly, the fact that the right to appeal was a creation of State law, rather than the Federal Constitution, did not by itself carry any logical force. Uncritically relying on that proposition had merely crabbed the State's line of analysis.

Second, Kentucky argued that even if the Due Process Clause applied to the manner in which a State conducts its system of appeals of right, it played no role in regulating a criminal defendant's due process interests on direct appeal because *Griffin* and its progeny had their source in the Equal Protection Clause, not the Due Process Clause, of the Fourteenth Amendment. In support of this contention, Kentucky pointed out that the cases in the *Griffin* line involved claims by indigent defendants that they have the same right to a decision on the merits of their appeal as do wealthier defendants who are able to afford lawyers, transcripts, or the other prerequisites of a fair adjudication on the merits. *Ibid.*

Again, the *Evitts* Court rejected this argument as resting "on a misunderstanding of the diverse sources of our holdings in this area." *Id.* at 403-04. In *Griffin*, for instance, the State had in effect dismissed the defendant's appeal because he could not afford a transcript. That disposition "violated equal protection principles because it distinguished between poor and rich with respect to such a vital right. But it also violated due process principles because it decided the appeal in a way that was arbitrary with respect to the issues involved." In *Griffin*, said the Court, "we noted that a court dispensing 'justice' at the trial level by charging the defendant for the privilege of pleading not guilty 'would make the constitutional promise of a fair trial a worthless thing.' • • • Deciding an appeal on the same basis would have the same obvious – and constitutionally fatal – defect." *Ibid.* *See also Douglas*, *supra*, 372 U.S. at 357 (procedure whereby indigent defendant must demonstrate merit of

case before obtaining counsel on appeal "does not comport with fair procedure").

In short, the State's arguments in *Evitts* failed because the State misapprehended *(1)* the limited significance of the notion that a right to direct appeal has its source in State law; *(2)* the critical role that due process (not merely equal protection) plays in the Court's decisions resolving rights on direct appeal; and *(3)* the analytical similarities between the *trial* and *direct appeal* stages with respect to such rights; similarities that, if not countenanced, would severely undermine the coherence of the Court's *Griffin* line of cases. As the Court reiterated quite recently, in cases affirming a defendant's due process rights on direct appeal, "the Court [has] evaluated the function and significance of a first appeal as of right, in light of prior cases," *Ohio Adult Parole Authority v. Woodard*, 118 S.Ct. 1244, 1251 (1998), in order to ensure the consistency of its controlling principles. The upshot of this approach is that there is "no continuum requiring varying levels of process at every conceivable phase of the criminal system," *ibid., citing inter alia, Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987) (no right to counsel in postconviction proceedings; and *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974) (no right to counsel for discretionary appeals on direct review). Direct appeal is thus categorically distinguishable from later or ancillary procedural contexts.

Thus, in *Ohio Adult Parole*, where the Court considered the applicability of procedural requirements relating to a State's executive clemency authority, "[a]n examination of the function and significance of the discretionary clemency decision at issue here readily shows it is far

different from the first appeal of right at issue in *Evitts*." *Id.* at 1251-52. Clemency proceedings are not " 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' " *ibid., citing Evitts*, 469 U.S. at 393. *Ibid.* "Procedures mandated under the Due Process Clause should be consistent with the nature of the governmental power being invoked. Here, the executive's clemency authority would cease to be a matter of grace committed to the executive authority if it were constrained by the sort of procedural requirements that respondent urges." *Ibid.*

Likewise instructive for its counterfactual value is *Pennsylvania v. Finley, supra*. In that case, the Court held *inter alia* that an indigent prisoner had no equal protection or due process right to appointed counsel in postconviction proceedings. "Since respondent has no underlying constitutional right to appointed counsel in state postconviction proceedings, she has no constitutional right to insist on . . . procedures which were designed solely to protect that underlying constitutional right." *Id.* at 557. In this procedural area, the Court reasoned, States have substantial discretion to develop and implement programs to aid prisoners seeking to secure postconviction review. "In Pennsylvania, the State has made a valid choice to give prisoners the assistance of counsel without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a *fundamentally different position – at trial and on first appeal as of right*." 481 U.S. at 559 (emphasis added). *Finley* thus presents a case where the logical connection between a State's creation of a right and the limits the State wishes

to impose on that right is a legitimate one. But a "fundamentally different position" distinguishes a defendant's "first appeal of right." *Ibid.*

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From the Court's analyses in the cases examined above, two points are especially noteworthy. *First*, as *Evitts* illustrates well, a State's perfunctory reliance on the true, but non-dispositive, proposition that appeals are a creature of State law – while it may have a certain rhetorical value – has little logical force. *Second*, nowhere in the reasoning of the Court's cases does there lurk the assumption (let alone the express claim) that due process requires or legitimates the imposition of counsel on a defendant who has not sought and does not desire counsel's assistance.

3. *The right to self-representation at trial.* In *Faretta v. California*, 422 U.S. 806 (1975), the Court addressed "whether a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so." Put differently, said the Court, "the question is whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." *Id.* at 807. The Court concluded that "a State may not constitutionally do so." *Ibid.*[3]

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[3] The defendant requested permission to represent himself at trial because he believed that the public defender's office was overworked. After questioning the defendant, the trial court granted his request, but later reversed its ruling. The defendant was subsequently convicted after being forced to accept representation at trial. 422 U.S. at 807-08.

A. The Court began its analysis by adverting to the rationale of its decision in *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942). In that case, "the Court recognized that the Sixth Amendment right to the assistance of counsel implicitly embodies a 'correlative right to dispense with a lawyer's help.' " *Id.* at 814-15, citing *Adams*, 317 U.S. at 275. The *Faretta* Court, noting that the *Adams* decision "[did] not necessarily resolve the issue before us" because it did not decide that a State may constitutionally force a lawyer on a defendant, nevertheless relied upon the following dicta from the *Adams* case in assessing whether there is "an affirmative right of self-representation." *Faretta*, 422 U.S. at 815.

> The right to assistance of counsel and *the correlative right* to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. . . .
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> What were contrived as protections for the accused should not be turned into fetters. . . . To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.
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> . . . When the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free

> choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.

Ibid., citing Adams, 317 U.S. at 279-80 (emphasis added in *Faretta*). The *Faretta* Court further noted that '[t]he holding of *Adams* was reaffirmed in a different context in *Carter v. Illinois,* 329 U.S. 173, 174-75 (1946), where the Court again adverted to the right of self-representation." *Faretta,* 422 U.S. at 815 n. 12. The *Carter* Court stated: "Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself or to confess guilt. Under appropriate circumstances the Constitution requires that counsel be tendered; it does not require that under all circumstances counsel be forced upon a defendant." *Carter,* 329 U.S. at 174-75.

B. The constitutional setting of *Faretta* is the Sixth Amendment as applied to a state criminal trial through the Fourteenth Amendment. Focusing on the text of the constitutional provision, the *Faretta* Court reasoned:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.' Although not stated in the Amendment in so many words, the right to self-representation – to make one's own defense personally – is thus necessarily implied by the structure of the Amendment. . . . The

> right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.
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> The counsel provision supplements this design. . . . The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant – not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists. It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. * * * This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative. An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.

Id. at 819-20 (citations omitted).

Faretta establishes that the right to counsel is more than a right to have one's case presented competently and effectively. It is predicated on the view that the

function of counsel is to protect the dignity and autonomy of a person on trial by *assisting* him in making choices that are his to make, not to make choices for him, notwithstanding that counsel may be better able to decide which tactics will be most effective. It is an inescapable implication of *Faretta* that if the Sixth Amendment were viewed as protecting principally the *State's* interest in fairness, the right to self-representation at trial would not exist.

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. . . . *Personal liberties are not rooted in the law of averages.* The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored. . . .

Id. at 384 (emphasis added).[4]

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[4] In *McKaskle v. Wiggins*, 465 U.S. 168 (1984), the Court, "mak[ing] explicit . . . what is already implicit in Faretta," id. at 184, held that "[a] defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel – even over the defendant's objection – to relieve the judge of the need

Faretta's rationale is significant for the instant case, not because the right to self-representation which the Court located in the Sixth Amendment applies to direct appeals of right *through* that Amendment, but for two other reasons. *First, Faretta* provides compelling guidance as to the core meaning of the "right to counsel" as a juridical concept. That the right to counsel should entail the correlative right to dispense with counsel – to forgo at one's election the offer of counsel that the State is obliged by due process to extend – *is* our conventional, time-honored manner of thinking about rights – and it is this view of rights that undergirds and makes meaningful the Court's decisions on any number of constitutional fronts affecting individual liberty interests.

Second, it follows that a State cannot deny a defendant the right to elect self-representation if the viability of that right arises in a procedural context that the Court's precedents classify, for analytical purposes, with the trial stage in which we meet *Faretta.* As the account in the previous section makes clear, direct appeal of right – precisely the procedural posture of the instant case – is indeed within that class of precedents.

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to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals." Ibid.

III. The Fallibility of the *Walker* Approach.

A. In denying Salvador Martinez' request to represent himself on direct appeal of his conviction, the appellate court relied on *In re Walker*, 56 Cal. App. 3d 225 (1976), which held that "there is no constitutional right of self-representation on appeal." *Id.* at 227. The *Walker* rationale is as follows:

> (i) – "An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. . . . It is wholly within the discretion of the state to allow or not to allow such review." *Ibid.*
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> (ii) – "It is therefore clear that the right of appeal may be accorded by the state to the accused upon such terms as in its wisdom may be deemed proper." *Ibid.*
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> (iii) – "California has made the right to appeal a statutory creature whose scope and authority is only as specifically delineated." *Ibid.*
>
> (iv) – "Once appellate review is established it must be kept free from any procedures which violate due process or equal protection of the law." A State "must provide counsel for the indigent on his first appeal as a matter of right," but this right is not unlimited, and "the states are free to deny an indigent an appointed attorney at other stages of appellate proceedings." *Id.* at 227-28.
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> (v) – Trials dispositively differ from appeals. "The discretionary nature of the power [of a court to foreclose self-representation] grows out of the fact that a prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court." *Id.* at 228.
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> (vi) – *Faretta* is inapposite because the Supreme Court in that case "did not have before it any claim of right to self-representation on appeal." *Ibid.*

Therefore: A defendant "has no constitutional right of self-representation on appeal."

B. Examined in light of the framework of the Court's precedents, the *Walker*-type argument cannot be sustained. Its substantive premises either are erroneous or do not carry logical force. Indeed, *Walker*'s rationale is reminiscent of the reasoning discredited by the Court in *Evitts*. *First*, the proposition that appeal of right is a creation of State law, while true, will not advance a State's argument that there is no constitutional right to self-representation. For cases within the set as to which the Court has deemed due process interests fundamental – that is, through first appeal of right – it simply does not matter that the right to an appeal is not a constitutional right. Over the years, the Court repeatedly has taken for granted the validity of that proposition, on the one hand, while nonetheless concluding in such landmark cases as *Griffin*, *Douglas*, and *Evitts* that direct appeal is a critical stage in the procedural life of a defendant's efforts to establish his innocence or expose trial court error, implicating constitutional guarantees for that reason. The defendant's right to counsel on direct appeal is no less a "constitutional right" because the opportunity for appeal in the first instance derives from state statutory authority, rather than from the Constitution.

Second, the fact that trial-level proceedings and proceedings at the level of direct appeal are procedurally (indeed, by definition) distinct, does not carry substantive force. As we have noted, the Court's decisions in right to representation cases mark procedural bounds, those stages at which the right to counsel is implicated because substantive rights of the defendant are at risk. At the upper end of this range is appeal of right. Discretionary appeals are of a *different*, distinguishable ilk. Thus, the cases teach that the pivotal procedural distinction for these purposes lies not at the line between trial and appeal, but between first appeal of right and subsequent discretionary appeals. The Court's recognition of direct appeal as a critical stage warranting a defendant's option to have counsel appointed, of course, means that the right is no less fundamental at that juncture than at previous stages of the prosecution.

Third, in the present context, due process and fairness implicate the individual rights of a defendant, not rights of the State. Thus, the premise of *Walker* and *Scott* that a State appellate court's "duty to ensure that appellants receive a fair appeal," *Scott, supra*, 64 Cal. App. 4th at 550, effectively requires the imposition of counsel, is erroneous. The constitutional right to representation, whether it flows from specific provisions of the Bill of Rights or is more directly derived from the concept of due process, is a right inhering in the person. By its nature, such a right implies a choice, a palpable degree of discretion in the individual. This essential quality is evident in the Court's well established doctrine that constitutional rights can be waived. *See, e.g., Del Vecchio v. Illinois*, 474 U.S. 883, 885 (1985) (A constitutional right, like any other right of an

accused, may be waived); *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966) (Defendant's constitutional right to plead not guilty and to have a trial where he could confront and cross-examine witnesses could not be waived by his counsel without defendant's consent); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (A waiver of the right to counsel is valid if it is voluntarily and understandingly made).

Wholly consonant with this orientation, the Fourteenth Amendment Due Process Clause provides that "[n]o State shall . . . deprive *any person* of life, liberty, or property, without due process of law" (emphasis added). The Clause is thus "phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security," and to "protect the people from the State." *DeShaney v. Winnebago Dept. of Social Services*, 489 U.S. 189, 195-96 (1989). *See also Harris v. McRae*, 448 U.S. 297, 317-318 (1980) ("The liberty protected by the Due Process Clause affords protection against unwanted government interference").

The anomaly in a *Walker*-type construction of the right to counsel can also be illustrated in a different way. If we do not offer to appoint counsel on direct appeal when a defendant wishes to have counsel appointed, but cannot afford a lawyer, this violates due process. The converse of that proposition – that due process is satisfied if we offer to appoint counsel – is a logically valid step. But it is not valid to say that due process is satisfied if we *force* appointed counsel on a defendant, because that state of affairs is *not* the negation of offering a defendant the assistance of counsel. Looked at in this more formal fashion, the State's error lies in an unwitting misuse of the logical form known as *modus tollens*.

Fourth, a right against the government is meaningful when considerations of general social utility alone are inadequate to authorize the State to override it. In other words, the essential characteristic of a right is that the State may not abridge it on the basis of the State's own view of fairness or on purely utilitarian considerations of what will be beneficial for society. Under *Walker*, a defendant does not have a right to due process, so much as a government benefit that he must accept. Under that interpretation, the State is truly making the defendant an offer he cannot refuse. Unfortunately, the State thereby violates a defendant's legitimate due process expectations.

CONCLUSION

The lower court's decision should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
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No. 98-7809

(7)

IN THE SUPREME COURT OF THE UNITED STATES

SALVADOR MARTINEZ, *Petitioner*,

v.

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, *Respondent*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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QUESTION PRESENTED

Does a criminal defendant have a constitutional right to elect self-representation on direct appeal from a judgment of conviction?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 98-7809

SALVADOR MARTINEZ, *Petitioner*,

v.

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, *Respondent*.

OPINION OR JUDGMENT BELOW

The unpublished opinion of the California Court of Appeal, Fourth Appellate District, Division Three, is reproduced at J.A. 1. The unpublished order of the Supreme Court of California denying Petitioner's petition for writ of mandate is reproduced at J.A. 2.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court, under Title 28 United States Code section 1257(a) to review a judgment of the California Court of Appeal, Fourth Appellate District, Division Three, which was entered on September 3, 1998. (J.A. 1.) The California Supreme Court denied a petition for writ of mandate on October 16, 1998. (J.A. 2.) The Petition for Writ of Certiorari was filed within the required ninety-day period following the final entry of judgment. The judgment of the California Court of Appeal became final for the

purposes of this Court with the denial of the petition for writ of mandate by the California Supreme Court.

CONSTITUTIONS, STATUTES OR REGULATIONS

The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment, section 1, states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 United States Code section 1654 states:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

California Rule of Court 76.5 states:

> (a) [Procedures] Each appellate court shall adopt procedures for appointment of counsel in criminal cases for indigent appellants who are not represented by the State Public Defender. The procedures shall require each attorney to complete a questionnaire showing the date of admission to the bar and the attorney's qualifications and experience.
>
> (b) [Lists of qualified attorneys] On receiving each completed questionnaire, the court shall evaluate the attorney's qualifications to represent appellants in criminal cases, and then place the attorney's name on one or more lists to receive appointments to cases for which he or she is qualified. Each Court of Appeal shall maintain at least two lists, to match the attorney's qualifications to the demands of the case. In establishing the lists, the court shall consider the guidelines in section 20 of the Standards of Judicial Administration, except as provided in subdivision (d).
>
> (c) [Evaluation] The court shall review and evaluate the performance of appointed counsel to determine whether counsel's name should remain on the same appointment list, be placed on a different list, or be deleted.

(d) [Contracts for performance of administrative functions] The court may contract with an administrator having substantial experience in handling criminal appeals to perform the functions specified in this rule. The guidelines in section 20 of the Standards of Judicial Administration need not be applied if the contract provides for a qualified attorney to consult with and assist appointed counsel concerning the issues on appeal and appellant's opening brief. The court shall provide the administrator with information needed for the performance of the administrator's duties, and, if the administrator is to perform the review and evaluation functions specified in subdivision (c), the court shall notify the administrator of superior or substandard performance by appointed counsel.

California Penal Code section 1240.1(b) states:

(b) It shall be the duty of every attorney representing an indigent defendant in any criminal, juvenile court, or civil commitment case to execute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment or orders to be appealed from, and where, in the attorney's judgment, it is in the defendant's interest to pursue any relief that may be available to him or her on appeal; or when directed to do so by a defendant having a right to appeal.

With the notice of appeal the attorney shall file a brief statement of the points to be raised on appeal and a designation of any document,

paper, pleading, or transcript of oral proceedings necessary to properly present those points on appeal when the document, paper, pleading or transcript of oral proceedings would not be included in the normal record on appeal according to the applicable provisions of the California Rules of Court. The executing of the notice of appeal by the defendant's attorney shall not constitute an undertaking to represent the defendant on appeal unless the undertaking is expressly stated in the notice of appeal.

If the defendant was represented by appointed counsel on the trial level, or if it appears that the defendant will request the appointment of counsel on appeal by reason of indigency, the trial attorney shall also assist the defendant in preparing and submitting a motion for the appointment of counsel and any supporting declaration or affidavit as to the defendant's financial condition. These documents shall be filed with the trial court at the time of filing a notice of appeal, and shall be transmitted by the clerk of the trial court to the clerk of the appellate court within three judicial days of their receipt. The appellate court shall act upon that motion without unnecessary delay. An attorney's failure to file a motion for the appointment of counsel with the notice of appeal shall not foreclose the defendant from filing a motion at any time it becomes known to him or her that the attorney has failed to do so, or at any time he or she shall become indigent if he or she was not previously indigent.

STATEMENT OF THE CASE

In May 1998, Petitioner, a thrice convicted felon, was working in the offices of defense attorney Lawrence Merryman in Santa Ana, California, as an office assistant. The victim telephoned Petitioner about getting her boyfriend out of jail. Petitioner told the victim he would need $6,000 to accomplish the task. Petitioner had the victim bring him the money. Petitioner stole the funds and kept them for himself. (J.A. 10-14.)

SUMMARY OF ARGUMENT

This Court's decision in Faretta v. California, 422 U.S. 806 (1975), contains significant flaws which should not be magnified by extending the right of self-representation to direct appeals in state courts.

The founding fathers did not believe that the right of self-representation was of constitutional magnitude. Instead, they simply viewed it as a procedure that warranted protection by federal statute. Moreover, the states were left free to create their own appellate court systems.

Each state-created appellate court system must comply with the dictates of the Due Process and Equal Protection Clauses. Where a state has adopted a system designed to ensure the reliability of the process and to minimize the risk of an erroneous decision, neither clause prevents the state from requiring all criminal appellants to be represented by counsel on direct appeals. The Federal Constitution does not dictate that the states must have one, and only one, rule for the appellate representation of convicted defendants on direct appeal. The burdens to the administration of the criminal justice system from any other rule would be too onerous.

ARGUMENT

I.

FARETTA CONTAINS SIGNIFICANT FLAWS WHICH SHOULD NOT BE MAGNIFIED BY EXPANDING THE RIGHT OF SELF-REPRESENTATION TO DIRECT APPEALS FROM STATE COURT JUDGMENTS

The major premise of Petitioner's argument is that the decision in Faretta v. California, 422 U.S. 806 (1975), has continuing validity and must be expanded to apply to every state appellate court system since there is no real difference between trials and first direct appeals. Petitioner is wrong on all counts. This Court's decision in Faretta was critically flawed and should no longer be followed. Even if this Court declines to reexamine Faretta at this time, there is no legal basis for extending it to direct criminal appeals in state courts given the applicable law and the significant differences between a trial and a first appeal.

When this Court decided Faretta, the majority posited that although the Sixth Amendment does not expressly grant the right to self-representation, that right is necessarily implied by the amendment's structure. Id. at 820. This Court also reasoned that thrusting trial counsel on an unwilling defendant would violate the principles of the Sixth Amendment because it would change the role of counsel from assistant to master, and thus, "the right to make a defense is stripped of the personal character upon which the [Sixth] Amendment insists." Id. Finally, this Court reviewed certain historical material and concluded that self-representation at the trial court was commonplace in both England and the American colonies. Id. at 831-32.

The Faretta opinion is flawed in three respects: it incorrectly assumes the language of the Sixth Amendment implies a right to self-representation; it commits a major historical error concerning the enactment of the Sixth Amendment; and it fails to consider the consequences of requiring self-representation on demand in the trial courts.

First, the language of the amendment does not support the Faretta majority's conclusion. As the three dissenting justices (including now Chief Justice Rehnquist) accurately noted, nothing in the language or the history of the Sixth Amendment implies any right to self-representation. Instead, as then Chief Justice Burger aptly noted, the amendment speaks "in uniformly mandatory terms" and the right to counsel is a central element of the right to a defense at trial. Faretta, 422 U.S. at 838. Justice Burger also noted that merely because a defendant has a constitutional right which he or she can waive, no inherent right to the opposite position exists. Id. at 841.

Justice Burger was absolutely correct. While a defendant has the right to a public trial, and can waive that right, he has no right to compel a private trial. While a defendant has the right to be tried in the state and district where the crime was committed, and can waive that right, he has no right to compel transfer of the case to another district. While a defendant has the right to confront the witnesses against him, and can waive that right, he cannot force the government to make its case by stipulations without witnesses. Thus, this aspect of the majority opinion is flawed.

The second major flaw comes in this Court's treatment of the timing of enactment of the Judiciary Act of 1789 (the "Act") and the drafting of the Sixth Amendment. The Act gave a statutory right to self-representation in federal criminal trials. (Now codified in 28 U.S.C § 1654.) The Act was first drafted in April 1789, and signed on September 24, 1789. 1789 House Journal

36; Wilfred J. Ritz, Rewriting the History of the Judiciary Act of 1789 16-17, 21 (1990). The Faretta majority stated that the day after the signing of the Act (September 25, 1789), the text of the Sixth Amendment was proposed in Congress and this timing implied that there was a congressional intent to include the right of self-representation into the Sixth Amendment. Faretta, 422 U.S. at 831.

The majority's position is historically inaccurate. While Congress passed an agreed resolution about the Sixth Amendment on September 25, 1789, the original draft of the Sixth Amendment was proposed by James Madison on June 8, 1789. Congressional Register, June 8, 1789, vol. 1, pp. 427-29 [quoted in Neil H. Cogan, The Complete Bill of Rights 385 (1997)]. The amendment was debated and revised over the next three months. The final text was made an enrolled resolution on September 29, 1789. Cogan, supra, at 400. Thus, at the very time that Congress was debating the Act it was simultaneously debating the text of the Sixth Amendment.

By choosing to place the right of self-representation into the Act and not into the text of the Sixth Amendment, Congress clearly made the decision that the right was not of constitutional magnitude but was simply a process which would be followed in the federal courts by legislative dictate. If Congress had considered the right of self-representation to be a fundamental constitutional right, then surely it would have specifically said so in the language of the Sixth Amendment. Instead, it enacted the matter as merely a federal statutory right in the Act. This action is convincing proof that the first Congress did not read any right of self-representation into the constitutional fabric of our nation. Thus, any suggestion by the Faretta majority that there was a solid historical underpinning for its analysis is simply wrong.

Finally, the third major flaw in the majority's opinion stems from the total absence of any discussion

concerning the potential effects on the criminal justice system caused by the recognition of this new right to self-representation at trial. This Court has recognized the consequences of constitutional interpretation to be a critical factor in other areas and should have considered the consequences then. Fay v. Noia, 372 U.S. 391, 399 (1963); Stovall v. Denno, 388 U.S. 293, 297 (1967) [impact on judicial system a critical factor in determinations of retroactivity]. Justice Blackmun warned of the dangers that would "haunt the trial of every defendant who elects to exercise his right to self-representation." Faretta, 422 U.S. at 852.

Justice Blackmun's dissent proved prescient. A recent exhaustive review of the cases decided in the state and federal courts since Faretta demonstrates that:

> [F]or the past twenty years the criminal justice system has struggled to mend the procedural holes left by the Faretta decision. The exercise of this right continues to hinder the efficiency of the criminal justice system and undermines the guarantee of justice afforded criminal defendants. Consequently what remains is an unrecognizable patchwork quilt, whose creator has lost sight of the original pattern.

John Decker, The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After Faretta, 6 Seaton Hall Const. L.J. 483, 498 (1996).

Thus, the goal of improving the criminal justice system, and better guaranteeing a defendant equal justice under law, has not been achieved by the holding in Faretta.

Indeed, while this Court may have intended Faretta as an overall benefit to the criminal justice system,

it has had a far different fate. Scores of cases have been reversed over hyper-technical applications of this rule. For example, in Moore v. Calderon, 108 F.3d 261, 264-65 (9th Cir. 1997), cert. denied, Calderon v. Moore, 521 U.S. 1111 (1997), the Ninth Circuit reversed a death penalty judgment because it disagreed with the Supreme Court of California about the timeliness of a request for self-representation. Similarly, in State v. Christensen, 40 Wash. App. 290, 698 P.2d 1069 (1985), the trial judge advised the defendant of his right to an attorney and admonished the defendant on the nature of the charges against him and the possible penalties. The defendant elected to proceed pro se and was subsequently convicted of all charges. The Court of Appeals of Washington reversed the conviction, holding that the defendant's waiver of counsel was defective. Although the trial judge inquired into the defendant's educational background, experience, literacy, and actual awareness of his right to counsel, as well as informed him of his right to counsel, the court of appeals held that the failure to advise the defendant of the technical aspects of his defense undermined the knowing and intelligent waiver of counsel and reversed the conviction. Id., 698 P.2d at 1070-72.

While Faretta's conclusion may have seemed like a reasonable proposition in the abstract, its application has proved a tremendous burden on the criminal justice system. As the Faretta decision is seriously flawed in three major respects, it should not be extended to apply to direct state appeals after a criminal trial. Indeed, this Court may wish to examine the continuing validity of Faretta itself.

II.

JUDICIAL SCRUTINY OF STATE APPELLATE PROCEDURES IS GOVERNED BY THE DUE PROCESS AND EQUAL PROTECTION CLAUSES AND NOT THE SIXTH AMENDMENT

Petitioner admits no specific language in the Constitution supports his claim that self-representation is constitutionally mandated. Petitioner also admits no historical evidence supports his claim. Instead, he relies upon dictum from this Court's decisions in an attempt to equate criminal trials with first appeals. He then extrapolates that all fundamental trial rights, including the right to self-representation, must apply to appeals. His analysis directly conflicts with this Court's pronouncements as to how constitutional rights are determined.

In determining whether a right is "fundamental," this Court has admonished courts not to take an "expansive view" of the "authority to discover new fundamental rights imbedded in the Due Process Clause," and has further admonished that there should be "great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental." Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986).

This Court looks to the text of the Constitution, not the purported "importance" of the asserted right, when deciding whether an asserted right is "fundamental." San Antonio School District v. Rodriguez, 411 U.S. 1, 33-35 (1973); see also, Vacco v. Quill, 521 U.S. 793, 799 (1997).

There is simply nothing in the Constitution concerning post conviction criminal appeals, let alone the right of self-representation in such matters. Since there is no constitutional mandate nor historical precedent for self-

representation on appeal, this Court should not read into the Constitution such a right.

"[T]he Due Process Clause does not demand uniformity of procedure . . . [e]ach State is free to devise its own way of securing essential justice in these situations." Hysler v. State of Florida, 315 U.S. 411, 416-17 (1942). Thus, states are "free to devise their own systems of review in criminal cases," the "[p]rocedural details for securing fairness" are left to the states, and the manner in which a state chooses to adjudicate claims is afforded wide discretion, "so long as they observe those ultimate dignities of man which the United States Constitution assures." Carter v. People of State of Illinois, 329 U.S. 173, 175 (1946).

A. Providing For Direct Appeals In Criminal Cases Is Not Constitutionally Compelled

Over a century ago, this Court held that the Constitution does not require states to grant appeals as of right to criminal defendants seeking to review alleged trial court errors, and that the right of review in an appellate court is purely a matter of state concern. Kohl v. Lehlback, 160 U.S. 293, 299 (1895); McKane v. Durston, 153 U.S. 684, 687-88 (1894). "Indeed, for a century after this Court was established, no appeal as of right existed in criminal cases, and, as a result, appellate review of criminal convictions was rarely allowed." Abney v. United States, 431 U.S. 651, 656 (1977). The statutory right to appeal a criminal conviction in federal courts did not arise until 1889 for death penalty cases and until 1911 in all other criminal cases. Id. at 655. It was not an original part of the judicial structure of the United States. This is hardly surprising since criminal appeals were virtually unknown in England. "Normally . . . there were no criminal appeals." Colin Rhys Lovell, English Constitutional and Legal History, Oxford University Press 214 (1962).

In the over 100 years since the decision in McKane, this Court has never retreated from its holding that a criminal defendant has no constitutional right to an appeal, and that it is wholly within the discretion of the states whether to allow such a review. Johnson v. Fankell, 520 U.S. 911, 932 n.13 (1997); M.L.B. v. S.L.J., 519 U.S. 102, 110 (1996); Goeke v. Branch, 514 U.S. 115, 120 (1995); Jones v. Barnes, 463 U.S. 745, 751 (1983); Abney, 431 U.S. at 656; United States v. MacCollom, 426 U.S. 317, 323 (1976); Estelle v. Dorrough, 420 U.S. 534, 536-38 (1975) (per curiam); Griffin v. Illinois, 351 U.S. 12, 18 (1956).

The claim by amicus curiae, the National Association of Criminal Defense Lawyers, that somehow the statutory right to appeal has, with the mere passage of time, been transformed into a constitutional right is without foundation. The mere passage of time cannot change the language and nature of this nation's Constitution nor change the underpinnings of the statutory right to appeal. Indeed, in numerous situations a citizen's relationship to the state government has existed for years but has not metamorphosized into a constitutional right. For example, even though the states have provided their residents with welfare benefits for decades, no one has been so bold as to suggest the practice has become a constitutional right to welfare. In fact, this Court has repeatedly rejected any such notion. Dandridge v. Williams, 397 U.S. 471, 478-79 (1970); Rodriguez, 411 U.S. at 33. The same is true as to a free public education. Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 458 (1988). Amicus, the National Association of Criminal Defense Lawyers, has not pointed to any instance where this Court has undertaken to transform a statutory right into one of constitutional magnitude. Having avoided such unnatural mental

gymnastics in the past, this Court should avoid them in this case as well.

B. Because The Constitution Does Not Compel States To Provide A Direct Appeal In Criminal Cases, The States Must Simply Comply With Due Process And Equal Protection Requirements In Providing An Appeal

The fact that state appellate courts are creations of statutes and not mandated by the Federal Constitution merely leads to the determination of the proper law to be used in evaluating Petitioner's central claim. It is not the lynch pin Petitioner claims. If a state has provided for appellate review as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," its appellate procedures must comport with the demands of the Due Process and Equal Protection Clauses to "protect persons . . . from invidious discriminations." Griffin, 351 U.S. at 18. To pass muster, the state's procedures must afford "adequate and effective appellate review." Id. at 20.

This Court's repeated pronouncements in this area have consistently demonstrated that the proper analysis for issues relating to direct appeals is within the Due Process and Equal Protection Clauses, not the Sixth Amendment. For example, in Griffin, this Court held that a transcript of the trial court proceedings must be provided to an indigent criminal appellant if that was the only way to ensure an "adequate and effective" appeal. Id. at 13-14. In doing so, this Court recognized that while a state had no constitutional obligation to provide appellate review, if the state chose to create such a right, the Due Process and Equal Protection Clauses protected indigent criminals from "invidious discriminations." Id. at 18.

Again, in 1963, this Court in Douglas v. California, 372 U.S. 353, 356-58 (1963), held that when a state in its discretion created a right to an appeal, it must provide counsel. This Court based such a right not on the Sixth Amendment, but on the Fourteenth Amendment, which required the state to make the appeal more than a "meaningless ritual" by supplying an indigent appellant with counsel. Id. at 358.

By contrast, on the same day, this Court held that the right of an indigent defendant to counsel at trial flowed from the explicit grant of that specific right in the Sixth Amendment, made applicable to the states through the Due Process Clause of the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 339 (1963).

In Rinaldi v. Yeager, 384 U.S. 305, 310 (1966), this Court summarized the Griffin line of decisions and held, without reference to the Sixth Amendment, that while the Court had never held that the states are required to establish avenues of appellate review, these avenues once established, "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." Requiring counsel on direct appeal does not impede this open and equal access. Indeed, it enhances it.

Subsequently, this Court held on Fourteenth Amendment grounds that an appointed appellate attorney must be available to assist in preparing and submitting a brief to the appellate court, Swenson v. Bosler, 386 U.S. 258, 259 (1967), and must play the role of an active advocate, rather than a mere friend of the court, assisting in a detached evaluation of the appellant's claim. Entsminger v. Iowa, 386 U.S. 748, 750-51 (1967); Anders v. California, 386 U.S. 738, 743-45 (1967).

In Ross v. Moffitt, 417 U.S. 600, 608-09 (1974), this Court held that under the Fourteenth Amendment the States were left to decide whether to provide counsel to indigent state defendants in their discretionary appeals. In

doing so, this Court acknowledged that the rationale for the Griffin and Douglas line of cases had "never been explicitly [established]" and that "some support" was found in both the Due Process and Equal Protection Clauses. Ross, 417 U.S. at 608-09. This Court in Ross recognized the critical differences between the trial and appellate stages. Id. at 610-11.

In Evitts v. Lucey, 469 U.S. 387 (1985), this Court held a state would violate due process if it penalized a criminal defendant by dismissing his first appeal as of right when appointed counsel failed to follow mandatory appellate rules, and that the right to appellate counsel meant the right to "effective assistance." Id. at 396.

Finally, in 1997, the Court in Johnson once again repeated that prior decisions "made it quite clear that it is a matter for each State to decide how to structure its judicial system," and that respect for the fundamental principles of federalism is at its apex when the Court is confronted with a claim "that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts." Johnson, 520 U.S. at 922 and n.13.

These decisions show that this Court has consistently turned to the Due Process and Equal Protection Clauses for decisions involving direct state appeals. This Court has not relied upon the Sixth Amendment as a tool in its analysis. It can be seen, then, that the rights of a criminal defendant to an appeal and to adequate counsel in that appeal, stem from the Due Process and Equal Protection Clauses through the Fourteenth Amendment, not from the Sixth Amendment, the foundation upon which Faretta rests.

III.

NEITHER THE DUE PROCESS CLAUSE NOR THE EQUAL PROTECTION CLAUSE REQUIRES THE STATE APPELLATE COURTS TO ALLOW SELF-REPRESENTATION ON APPEAL

The inquiry for this Court is whether denial of self-representation on direct appeal contravenes due process or equal protection guarantees. The Sixth Amendment does not play a role in the analysis. While due process and equal protection require the state to provide an indigent criminal appellant with appointed counsel on the initial appeal as of right, it does not follow that the denial of self-representation violates due process or equal protection. As the Seventh Circuit has aptly noted, "We find it conceptually difficult to imply in the 'equal protection right' to counsel on direct appeal a correlative right of self-representation on direct appeal." Lumbert v. Finley, 735 F.2d 239, 246 (7th Cir. 1984). Similarly, the court noted that due process principles requiring that an indigent be provided with counsel on appeal do not imply a correlative right to self-representation on appeal. Id.

A. Due Process Is A Flexible Concept That Varies With The Process At Issue

The Due Process Clause of the Fourteenth Amendment "incorporates many of the specific protections defined in the Bill of Rights." Zinermon v. Burch, 494 U.S. 113, 125 (1990). Additionally, the Due Process Clause "encompasses . . . a guarantee of fair procedure." Id.

> The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. [Citations.] "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." It is "compounded of history, reason, the past course of decisions . . . ." [Citation.]

Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

The Due Process Clause, unlike the strict commands of the Sixth Amendment, generally focuses on the reliability or fairness of the process. Id.; Gilbert v. Homar, 520 U.S. 924, 932 (1997). In this regard, "due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972); see also, Gilbert, at 929; Zinermon, 494 U.S. at 128.

Thus, the due process guarantee, unlike the Sixth Amendment's guarantee of the right to counsel and self-representation at trial, is meant to "minimize the risk of erroneous decisions," and "the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error." Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 13 (1979). The flexibility of due process is "a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." Morrissey, 408 U.S. at 481.

The Due Process Clause protects only those "fundamental rights and liberties" which are "'deeply rooted in this Nation's history and tradition,'" and "'implicit in the concept of ordered liberty,'" such that "'neither liberty nor justice would exist if they were sacrificed.'" Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997), citing Moore v. City of East Cleveland, Ohio,

431 U.S. 494, 503 (1977); Palko v. Connecticut, 302 U.S. 319, 325 (1937); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). As noted, supra at pages 9, 14, and 15, criminal appeals are not deeply rooted in this nation's history or tradition or in our English common law background.

B. Requiring A Defendant To Have Legal Counsel On Appeal Improves The Reliability Of The Process And Minimizes The Risks Of An Erroneous Decision, Which Thereby Promotes The State's Interest In Ensuring The Correctness Of Its Trial Court Judgments

Denial of self-representation on appeal does not impair the fundamental fairness of the proceeding. Instead, it increases the reliability of the process and minimizes the risks of an erroneous decision by ensuring that the defendant's appeal will be presented by a qualified, strong advocate. Therefore, self-representation is not a requirement of due process. Disallowing self-representation on first appeal by criminal defendants promotes the state's interest and the individual's own interests in ensuring every convicted person is accorded full, fair, and effective appellate review.

The state has a compelling "interest in [e]nsuring an adequate appellate review of judgments which deprive individuals of their liberty." Blandino v. State, 112 Nev. 352, 914 P.2d 624, 627 (1996), cert. denied, Blandino v. Nevada, 519 U.S. 881 (1996); accord, U.S. v. Turnbull, 888 F.2d 636, 639-40, (9th Cir. 1989), cert. denied, Turnbull v. U.S., 498 U.S. 825 (1990).

Because a prisoner is not entitled to present oral argument, representation through counsel helps ensure adequate appellate review. In Price v. Johnston, 334 U.S. 266, 285 (1948), this Court held:

> [A] prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court. [Citation.] The absence of that right is in sharp contrast to his constitutional prerogative of being present in person at each significant stage of a felony prosecution [citation], and to his recognized privilege of conducting his own defense at the trial. Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.

Faretta itself acknowledged this distinction. While Faretta recognized a criminal defendant has a right to self-representation at trial under the Sixth Amendment, this Court specifically distinguished the right to conduct one's own defense at trial from other stages of the judicial process. The majority opinion in Faretta observed:

> [I]n [Price], the Court, in holding that a convicted person had no absolute right to argue his own appeal, said this holding was in "sharp contrast" to his "recognized privilege of conducting his own defense at the trial." [Citation.]

Faretta, 422 U.S. at 816.

Thus, Faretta did not limit Price but cited it with approval. Consequently, even after Faretta there is no right of a convicted incarcerated defendant to present oral argument on appeal.

Because a prisoner is effectively precluded from arguing his or her own appeal or even from being present at the proceedings in the appellate court (Price, 334 U.S. at 285), if a criminal appellant were to proceed in pro se,

the reviewing court would lose "the benefits of listening to his contentions, hearing only the arguments of government counsel." Price, 334 U.S. at 280. It is not a satisfactory answer to say that an unrepresented appellant simply may waive oral argument.

> [T]here are occasions when a court deems it essential that oral argument be had; indeed, a court order or request to that effect may be necessary where the parties have previously indicated a willingness to forego the privilege. In such situations where oral argument is slated to take place, fairness and orderly appellate procedure demand that both parties be accorded an equal opportunity to participate in the argument . . . ."

Id.

The lack of counsel has other ramifications. As many courts have observed, as a practical matter, it requires an attorney to present an appeal in a form suitable for appellate consideration on the merits. This is because in an appeal there are "intricate rules that to a layperson would be hopelessly forbidding." Evitts, 469 U.S. at 396. Documents filed by persons:

> [W]ho are untrained in the law are often incoherent and fail to identify the issues presented on appeal. Poorly drafted pleadings also require additional time to review and add to the already overwhelming workload of this court.

Blandino, 914 P.2d at 626.

Allowing self-representation would aggravate the burdens imposed by Anders, which already requires an appellate court to conduct a review of the entire record whenever

appointed counsel submits a brief which raises no specific issues. Anders, 386 U.S. at 745-46.

For these additional reasons, the due process right to a fair appeal would be hindered by establishing a right to self-representation on appeal.

C. California's Appellate System Ensures That Every Appeal Is Constitutionally Adequate By Requiring The Effective Assistance Of Counsel On Appeal

California has implemented proper safeguards to ensure the fairness of the appellate process through adequate appellate representation. These procedures fully satisfy the Due Process and Equal Protection Clauses. Rule 470 of the California Rules of Court requires trial courts at the time of judgment and sentencing to advise defendants of their appellate rights, including the right of an indigent defendant to have counsel appointed by the reviewing court, and the steps that must be taken to protect those rights. In the case of an indigent defendant, the trial attorney has a statutory duty to:

> [E]xecute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment or orders to be appealed from . . . .

Cal. Penal Code § 1240.1(b).

To implement the right to counsel on appeal, the courts contract with either the California Appellate Project ("CAP") or Appellate Defenders, Inc. ("ADI"), which perform administrative functions in connection with the appointment of appellate counsel. Any appointed

counsel is required to consult with qualified staff attorneys employed by CAP and ADI. These staff attorneys consult and assist appointed counsel concerning the issues on appeal and review drafts of each appellant's opening briefs.

An appellate counsel appointed to represent a criminal defendant is required to act as a competent advocate. As stated in People v. Harris, 19 Cal. App. 4th 709, 713-14, 23 Cal. Rptr. 2d 586 (1993):

> A criminal defendant has a right not only to counsel on appeal [citation], but to competent counsel on appeal. [Citation.]

Some of the specific duties which appointed appellate counsel must fulfill to meet his or her obligations as a competent advocate include: the duty to ensure a proper record is prepared (People v. Acosta, 48 Cal. App. 4th 411, 426, 55 Cal. Rptr. 2d 675 (1996)); the duty to write a brief which discusses all of the material facts (Id. at 427); the duty to prepare a brief containing citations to the appellate record and appropriate authority, and setting forth all arguable issues; and the further duty not to argue the case against a client (People v. Barton, 21 Cal. 3d 513, 519, 579 P.2d 1043, 146 Cal. Rptr. 727 (1978)). Additionally, appellate counsel serves both the court and the client by advocating changes in the law if argument can be made supporting change.

Thus, California has endeavored to secure full and fair appellate review of criminal convictions through competent appellate representation.

D. The Administrative Burden On The Criminal Justice System Of Allowing Pro Se Defendants Would Be Significant And Contrary To The Principles Of Due Process

The administrative burden that self-representation would entail is a relevant consideration in determining whether due process requires pro se criminal defendants on direct appeal. Zinermon, 494 U.S. at 127; Gilbert, 520 U.S. at 931.

In defining the process necessary to ensure "'fundamental fairness,'" this Court has recognized that the Due Process Clause does not require that the procedures used are "'so comprehensive as to preclude any possibility of error,'" and that "the marginal gains from affording an additional procedural safeguard often may be outweighed by the societal cost of providing such a safeguard." Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 320 (1985).

As was discussed earlier, supra at pages 10 through 12, the burdens to the criminal justice system of allowing pro se criminal defendants on appeal would be significant. The poorly drafted pleadings, the failure to identify issues on appeal, and the failure to know or understand the intricate appellate rules would all have major negative impacts on the state criminal justice systems.

This Court has repeatedly recognized the heavy toll that habeas corpus cases, the vast majority of which are pursued by in pro se convicts, take upon the judicial system. "Federal habeas litigation also places a heavy burden on scarce judicial resources . . ." Keeney v. Tamayo-Reyes, 504 U.S. 1, 7 (1992); McCleskey v. Zant, 499 U.S. 467, 491-92 (1991). Expanding the right of self-representation to state direct appeals would impose such heavy burdens on each and every state court judicial

system with no concomitant increase in the reliability of the results.

It is often said that when a convicted defendant decides to proceed in pro se, "'he is entitled to the same, but no greater, consideration than other litigants and attorneys.'" Bistawros v. Greenberg, 189 Cal. App. 3d 189, 193, 234 Cal. Rptr. 377 (1987). However, State v. Seifert, 423 N.W.2d 368, 378 (Minn. 1988) (Wahl, J., dissenting) [footnote omitted], pinpoints the dilemma:

> While we can say that it is the inmate's problem that he finds himself without adequate resources to research and write an effective brief, the true result more likely will be that when an appellate judge reads an incomprehensible *pro se* brief, that judge will be forced, out of conscience, to wear two hats--that of judge and that of advocate--in order to assure the integrity of our reviewing function. This will also be true of our law clerks doing research and preparing bench memos, when issues and cases have not been adequately briefed. Do we have the resources to do this and is it appropriate for us to do so?

Respondent submits that the answer is no. Appellate courts have the "inherent power . . . to develop rules of procedure aimed at facilitating the administration of criminal justice." Joe Z. v. Superior Court, 3 Cal. 3d 797, 801-02, 478 P.2d 26, 91 Cal. Rptr. 594 (1970). Allowing self-representation by criminal defendants on appeal who have access to competent appellate counsel would not represent a wise use of scarce judicial resources, which is a perennial concern of the courts. See, In re Sindram, 498 U.S. 177, 179-80 (1991). As this Court concluded in Sindram, pro se litigants can quickly deplete a court's limited resources:

> The goal of fairly dispensing justice . . . is compromised when the Court is forced to devote its limited resources to the processing of repetitious and frivolous requests. *Pro se* petitioners have a greater capacity than most to disrupt the fair allocation of judicial resources . . .

Sindram, 498 U.S. at 179-80.

In addition to the general problems mentioned above, there are a myriad of other negative impacts that this Court will immediately face if it accepts Petitioner's argument. If this Court requires states to allow self-representation in direct appeals, then this Court will have to revisit its numerous cases holding that a state is not required to provide access to a law library or access to legal materials to prison inmates. Lewis v. Casey, 518 U.S. 343, 351-52 (1996); Bounds v. Smith, 430 U.S. 817, 828 (1977); see also, Murray v. Giarratano, 492 U.S. 1, 13 (1989) (O'Conner, J., concurring) ["[b]eyond the requirements of Bounds, the matter is one of legislative choice based on difficult policy considerations and the allocation of scarce legal resources"].

Petitioner never mentions the impact of the distinct disadvantage that a criminal defendant will be under when alone faced with "intricate rules that to a layperson would be hopelessly forbidding." Evitts, 469 U.S. at 396.

The next major problem immediately facing the lower appellate courts will be the proper way to determine who is competent to waive the right to appeal. This Court has held that a waiver of the right to have trial counsel must be an "'intelligent and competent waiver.'" Godinez v. Moran, 509 U.S. 389, 396, 401 (1993). In a trial court the judge can personally question the defendant and observe his or her demeanor, voice, tone, and facial

expressions as well as the content of the answers to questions in determining that the person is legally capable of making such a determination. Appellate courts, often located hundreds of miles from the penal institutions, can make no such personal observations of competency. Relying on the written word alone offers no assurances that the signer properly understood the document, or that the person who signed the document is actually the appellant in that particular case. What written procedure can take the part of an in-person waiver of rights? Will the appellate court be forced to conduct hearings with the defendant present in order to make a sufficient inquiry? If so, the morass will be staggering.

Moreover, if, as Petitioner claims, critical trial rights apply to direct appeals, what becomes of the right to be present for the proceedings? Often the sole public event in a direct appeal is the oral argument. If a petitioner has the right to proceed in pro se, then this Court will have to totally re-evaluate its holdings in Price and its progeny that prisoners have no right to appear at oral argument in their direct appeals.

Equally difficult problems will occur in the area of death penalty litigation, where the issues confronting the courts are inherently complex and intricate. Even with counsel, the litigation drags on for years. If a death row inmate had the right to proceed in pro se and opted for that right, the litigation would undoubtedly be even more involved and more delayed. In such cases, the state has an indisputable interest in the prompt and proper outcome of the appeal which the appellant should not be allowed to unilaterally thwart.

Petitioner's claim that the right to self-representation is "conceptually necessary" in the framework of this Court's decisions, is not supported by those cases or by logic. Petitioner quotes from several cases involving collateral attacks on convictions and tries to show that this Court has contrasted trials and direct

appeals with collateral attacks on judgments and in doing so has held that the trial rights and the direct appeal rights must be co-extensive. In large measure, Petitioner relies upon dictum in Ross that contrasted trials and first appeals with habeas and other collateral attacks. While there is such language in the Court's decision, it does not make the giant constitutional leap Petitioner contends by finding that the two stages contain the same constitutional rights. Indeed, Petitioner conveniently overlooks the fact that this Court specifically stated that, "The fact than an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way." Ross, 417 U.S. at 611. If Petitioner's analysis of this Court's decisions were correct, this principle would not be true. This quote shows that this Court has not considered appeal rights as co-extensive with trial self-representation rights as Petitioner repeatedly claims.

In sum, the numerous administrative burdens presented by self-representation on appeal further support the conclusion the due process right to a fair appeal would be hindered by establishing a right to self-representation on appeal.

E. Requiring An Attorney For Any Direct Criminal Appeal Does Not Violate Due Process

Because due process is a flexible concept that varies with the particular situation, to determine what procedural protections the Constitution requires in a particular case, a court:

> [W]eigh[s] several factors: [¶] "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." [Citation.]

Zinermon, 494 U.S. at 127; accord, Gilbert, 520 U.S. at 930.

Petitioner's private interest is his desire to represent himself on appeal. The risk of an erroneous deprivation of that interest is minute and tolerable because, as discussed above, California has implemented an elaborate mechanism to ensure competent legal representation of its criminal appellants. People v. Scott, 64 Cal. App. 4th 550, 561, 75 Cal. Rptr. 2d 315 (1998). Any diminution of Petitioner's possible activities is more than offset by the increased reliability of the appellate process in his case.

The probable value of the procedure sought by Petitioner is slight. As discussed above, laypersons generally are ill-equipped to prosecute a criminal appeal. Also, as a prisoner, Petitioner would be precluded from presenting oral argument. Thus, he is seeking a procedure that will simply put him at a disadvantage to the state and lessen his chances of having a full and vigorously argued appeal. The core right recognized in Faretta was a charged defendant's personal dignity interest in being able to stand before a jury of his peers and conduct his own defense. Faretta, 422 U.S. at 835. An appeal is purely a judicial review, based in law and the record, without the human dynamics of a jury trial that Faretta relied upon.

Finally, the administrative burden of self-representation would hinder the efficient functioning

of the appellate court, squander scarce judicial resources, and decrease the chances of a just and proper result.

Thus, Petitioner's interest in self-representation is outweighed by other considerations, including California's interest in ensuring adequate appellate review. The denial of self-representation does not impair the fundamental fairness of the appellate process, it enhances it. Consequently, Petitioner's contention he has a due process right to self-representation should be rejected by this Court.

F. Since All Criminal Appellants In California Are Treated Equally, No Equal Protection Problem Exists

The Equal Protection Clause of the Fourteenth Amendment declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decision makers from treating differently persons who are in all relevant respects alike. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

As a general rule, states "are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). Accordingly, this Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest. See, e.g., Cleburne v. Cleburne Living Center,

Inc., 473 U.S. 432, 439-41 (1985); New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

In dealing with challenges to a state's regulation of the right of appeal in criminal cases, this Court applies the traditional rational-basis test. Dorrough, 420 U.S. at 538; Rinaldi, 384 U.S. at 309. Under the rational basis test:

> If a legislative classification or distinction "neither burdens a fundamental right nor targets a suspect class, [the Court] will uphold [it] so long as it bears a rational relation to some legitimate end."

Vacco, 521 U.S. at 793, 799, citing Romer v. Evans, 517 U.S. 620 (1996).

> [A] classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," [Citation] [¶] . . . A statute is presumed constitutional [citation], and "[t]he burden is on the one attacking the legislative arrangement to [negate] every conceivable basis which might support it," [citation], . . . whether or not the basis has a foundation in the record.

Heller v. Doe, 509 U.S. 312, 320 (1993).

"Generally speaking, laws that apply evenhandedly to all 'unquestionably comply' with the Equal Protection Clause." Vacco, 521 U.S. at 800; New York City Transit Authority v. Beazer, 440 U.S. 568, 587-88 (1979). A classification not involving fundamental rights nor proceeding along suspect lines is accorded a "strong presumption of validity." Heller, 509 U.S. at 319.

California's denial of self-representation on appeal applies evenly to all criminal defendants, In re Walker, 56 Cal. App. 3d 225, 227-28, 128 Cal. Rptr. 291 (1976), and thus the denial unquestionably complies with the Equal Protection Clause.

Even if the classes are viewed differently, as those criminal defendants who are allowed to proceed in pro se at trial versus those criminal defendants on appeal who cannot proceed in pro se, there is still no equal protection problem. It is well-settled that at trial, unlike an appeal, the state's desire is to transform a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. In order to accomplish this purpose, the prosecuting attorney presents evidence and witnesses, cross-examines, contradicts and challenges defense witnesses, challenges and argues rulings of the court, and directs arguments to both the court and jury in order to convince them of the defendant's guilt.

In contrast, it is generally the criminal defendant, rather than the state, who initiates the appellate process, seeking to overturn the guilty verdict, rather than fending off the efforts of the state's prosecutor. The defendant seeks to overturn the presumption of regularity that attaches to the conviction. The criminal defendant under these circumstances needs an appellate attorney not, as he does at trial, to shield him from being "'haled into court'" by the state and stripped of his presumption of innocence, but instead as a "sword" to upset the prior determination of guilt. Ross, 417 U.S. at 611.

> This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all.

Id.

Petitioner totally ignores these critical differences and simply equates trials with appeals.

But even assuming arguendo that somehow the two groups were similarly situated, there is a rational basis for not extending the right of self-representation to criminal defendants on direct appeal. Under the Sixth Amendment, numerous personal constitutional rights attach to a defendant. It is the:

> [A]ccused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor."

Faretta, 422 U.S. at 819.

The accused also is entitled "to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." Id. at 819 n.15. Further, a criminal defendant has a fundamental constitutional right at trial to present testimony on his or her own behalf. Rock v. Arkansas, 483 U.S. 44, 51-53 (1987).

In contrast, while the trial is essentially a factfinding process, wherein the personal actions of the defendant could impact the outcome, an appeal is essentially a legal process in which counsel assembles facts from the existing record, correlates them with the case law and attempts to establish reversible error. The presumption of innocence is gone. Moreover, where a criminal appellant proceeds in pro se, at oral argument the reviewing court loses "the benefits of listening to his contentions, hearing only the arguments of government counsel." Price, 334 U.S. at 280. Therefore, self-representation on appeal would undermine the state's profound interest in ensuring adequate review of criminal convictions. Blandino, 914 P.2d at 627.

Petitioner has failed to show that the lack of personal input of the defendant on appeal will have any impact at all. The potential role of the convicted defendant, and his or her interest, is greatly reduced compared to trial. Thus, there is no equal protection basis on which to require the states to surrender their carefully developed procedures and follow a new constitutional requirement to allow convicted defendants to proceed pro se on appeal.

In sum, there is simply no good reason to alter years of fundamental understanding about the relationship of the state and federal judicial processes by imposing upon the states a constitutional requirement that they afford a convicted criminal defendant the right to elect self-representation on appeal.

IV.

OTHER JURISDICTIONS THAT HAVE CAREFULLY CONSIDERED THIS ISSUE HAVE CONCLUDED THAT THERE IS NO CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION ON APPEAL

A review of the decisions in other jurisdictions, both state and federal, shows that those courts that have carefully considered the issue have declined to extend Faretta into the appellate realm. Those courts that have extended it, have done so with little or no discussion of the issue raised in this case or have done so by contradicting cases from this Court.

The Supreme Court of Nevada examined the issue and concluded that the Sixth Amendment applied only to trials and does not carry over and require self-representation on appeal. Blandino, 914 P.2d at 625-26. The court carefully detailed that it could not complete its task of ensuring the fairness of criminal appeals if it were faced with only a pro se appellant who filed incoherent documents that failed to identify the issues on appeal. Id.

The Court of Criminal Appeals for Tennessee made a similar analysis concluding that the matter was controlled not by the Sixth Amendment but by due process and equal protection grounds. Tennessee v. Gillespie, 898 S.W.2d 738, 741 (1994).

The Florida Supreme Court determined that Faretta did not apply to appeals. The court cited with approval the already quoted portion of the decision in Price, holding that a prisoner has no absolute right to argue his own appeal or even to be present at the proceedings. Hill v. Florida, 656 So. 2d 1271, 1272 (1995).

The Court of Special Appeals for Maryland also relied upon Price to conclude that there was no right to self-representation on appeal. The court noted that the

rights at trial were in sharp contrast to those on appeal. Callahan v. State, 30 Md. App. 628, 354 A.2d 191 (1976).

In the federal arena, both the Fourth and Seventh Circuits have recognized that there is no constitutional right to proceed in pro se on appeal. The Seventh Circuit in Lumbert rejected the claim that Faretta stands for the proposition that the Sixth Amendment applies to post-conviction appeals and guarantees a right of self-representation. The court noted the "significant differences between the trial and appellate stages of a criminal proceeding." Lumbert, 735 F.2d at 245. It noted that in Douglas this Court stated:

> [W]here the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.

Id., citing Douglas, 372 U.S. at 357.

In United States v. Gillis, 773 F.2d 549, 559-60 (4th Cir. 1985), the court held that there was no constitutional right to proceed in pro se in a state post conviction appeal. The court recognized that the right to counsel and the right to self-representation stand on different ground. Unlike the right to trial, which is also guaranteed by the Sixth Amendment, there is no constitutional right to an appeal. Since appeals are statutory creations, the Due Process and Equal Protection Clauses apply. The implicit rights found by this Court in the Sixth Amendment concerning self-representation do not carry over to the appeal. Id. at 559-60.

Several state and federal courts have concluded that there is a constitutional right to proceed in pro se on appeal. But all of them do so with little or no analysis. They simply assume that Faretta applies to appeals or they equate appeals with trials and fail to perceive any

meaningful distinction between the right to represent oneself at trial with the right to represent oneself on appeal.

For example, the Indiana Supreme Court and the Michigan Court of Appeals concluded without analysis that there was no meaningful distinction between a trial and appeal that would prevent the application of Faretta. Webb v. State, 274 Ind. 540, 412 N.E.2d 790, 992 (1980); People v. Stephens, 71 Mich. App. 33, 246 N.W.2d 429, 432 (1976). The Pennsylvania and Arkansas Supreme Courts simply assumed that Faretta applied to appeals. Commonwealth v. Rogers, 537 Pa. 581, 645 A.2d 223, 224 (1994); State v. Van Pelt, 305 Ark. 125, 810 S.W.2d 27, 28 (1991).

In the federal area, the Ninth Circuit also assumed without discussion or analysis that Faretta applies to appeals. Campbell v. Blodgett, 940 F.2d 549 (9th Cir. 1991), mandamus denied, In re Blodgett, 502 U.S. 236 (1992).

In Chamberlain v. Ericksen, 744 F.2d 628, 630 (8th Cir. 1984), cert. denied, 470 U.S. 1008 (1985), the federal court took a different tact in concluding that Faretta applied to post conviction appeals. The court stated it did not have to reach the defendant's constitutional claims. However, the court did recognize that "it is not settled whether the right to self-representation under Faretta extends to a defendant's appeal from a conviction." The court went on to note that, "This court and other courts have also expressly or implicitly recognized a difference between the right [of self-representation] at trial and on appeal." But the court went on to conclude that the right must apply to appeals because a court cannot force counsel upon a defendant. Id. at 630.

The problem with such an analysis is that it misconstrues the holdings of this Court. The argument stems from a passage in Adams v. United States ex. rel.

McCann, 317 U.S. 269, 279 (1942). In that case, when this Court stated that, "the Constitution does not force a lawyer upon a defendant," it was clear it was discussing the rights of a defendant at trial since the very next sentence states that the defendant can waive his right to counsel and represent himself. "He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open." McCann, 317 U.S. at 279. The comments were made in the context of a trial. This selective use of the quote from McCann distorts this Court's holding in that case.

Moreover, no counsel is being forced onto a defendant in an appeal. The trial is initiated by the state and it will be held, normally against the wishes of the defendant. Under those circumstances, appointing defense counsel does force a lawyer onto a criminal defendant because the trial will inevitably occur as a result of the state's action. The lawyer will have to represent the defendant in that circumstance. But the same is not true for appeals. In non-death-penalty situations, the appeal occurs only if the defendant asks for one. Under such circumstances, if he or she seeks such a review, the defendant must accept the requirements that go with such an appeal, such as the time limits, the length of briefs, and the use of a lawyer. No lawyer is appointed except in response to the request for an appeal. Since the entire appeal is initiated by the request of the defendant, instead of by the filing of charges by the state, counsel is not being forced upon an appellant.

Chamberlain is also flawed in that while it acknowledges the conclusion in Price that a prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court, it reaches the opposite conclusion. Chamberlain, 744 F.2d at 630. As such, the decision in Chamberlain is faulty and of no precedential value in deciding the matter at issue in this case.

Therefore, all of the cases that have carefully examined this issue have concluded that there is no constitutional right to self-representation. The cases that do not reach this conclusion do so by faulty logic or no analysis at all. As such, they are not persuasive and should not be followed.

This Court should recognize that each state has the right to devise its own appellate court system. So long as a state's system meets due process and equal protection requirements, it should not be intruded upon by the federal courts. The Federal Constitution was designed to allow each of the states flexibility to devise their own systems of jurisprudence. The founding fathers did not envision a system where the states would be required to follow a narrow federal blueprint for their appellate systems. This Court should not force each of the states to follow one particular mold designed by the federal government.

CONCLUSION

Accordingly, Respondent respectfully asks that the ruling of the California Supreme Court be affirmed.

Dated: September 8, 1999.

Respectfully submitted,

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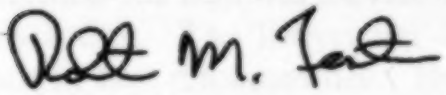

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Supreme Court, U.S.
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No. 98-7809

In The

Supreme Court of the United States

SALVADOR MARTINEZ,

Petitioner,

v.

COURT OF APPEAL OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of California

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

When Lord Byron was a student at Cambridge, he circumvented a rule against keeping a dog in college rooms by keeping a bear instead, illustrating the pointlessness of a system of rules unprotected by a requirement that they be interpreted coherently and in the light of harmonizing principles. The humor in this anecdote is precisely that the rationalizing principle in play – namely, that for purposes of the university's rule, dogs and bears *are indeed both* members of the proscribed class of unwelcome pets – was obvious, yet wholly ignored.

Respondent attempts a similar Byronesque gambit in its brief – first by arguing that *Faretta v. California*, 422 U.S. 806 (1975), is irrelevant here because it is bad law or it offers no legal guidance for resolving the instant case; and second, by urging that there are dispositive differences between a trial and direct appeal which preclude classifying the two stages together for the limited purposes of the issue before the Court. Respondent's argument should meet the fate that would have fallen to Byron's bear, but for the university's forgiving sense of humor.

ARGUMENT

I. RESPONDENT HAS MISAPPREHENDED THE ROLE OF *FARETTA* IN PETITIONER'S ANALYSIS.

Respondent opens the substantive portion of its brief with five pages of argument as to why the Court's 1975 decision in *Faretta v. California* "was critically flawed and

should no longer be followed." Resp. Brief at 8-12. Attacking *Faretta* is tactically necessary, in Respondent's view, on the theory that "[t]he major premise of Petitioner's argument is that the decision in *Faretta* . . . has continuing validity and must be expanded to apply to every state appellate court system since there is no real difference between trials and first direct appeals." Resp. Brief at 8. Respondent further urges, apparently in the alternative, that "[e]ven if this Court declines to reexamine *Faretta* at this time, there is no legal basis for extending it to direct criminal appeals in state courts given the applicable law and the significant differences between a trial and a first appeal." *Ibid.*

If it is Respondent's position that Mr. Martinez's argument assumes, for the sake of the *structure* of his argument, that *Faretta* is a relevant precedent, that is correct but it is hardly controversial. In American constitutional jurisprudence, parties employ the Court's prior decisions in building constitutional arguments; that is the essence of the doctrine of *stare decisis*. The rationales of those decisions are taken seriously and their validity assumed as working hypotheses in argument-building, *not* because "the Court has spoken," but because it has spoken in a rationally defensible way employing a characteristic argument style. Indeed, this is the very compelling quality of the doctrine of *stare decisis*, and the principal reason the Court is reluctant to abandon its previous decisions except in the rare case.

The unique style of argument in constitutional adjudication reflects the central importance of earlier cases, which in turn have their own genealogy and relatedness to other cases and principles. The rationale for any new

case therefore takes a form in which the Court tries to knit precedents together in a coherent way, based on rationales and salient principles of earlier cases that are themselves logically intertwined. It is for this reason that evidence of the *absence* of this conceptual inter-relatedness of cases draws the indictment that a new decision is "cut from whole cloth," and the warning that "any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

Thus, although the doctrine of *stare decisis* is not an "inexorable command," *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting), the Court repeatedly has emphasized that a commitment to precedent is fundamental to "a society governed by the rule of law," *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420 (1983). *See generally, Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) ("[I]t is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.' THE FEDERALIST, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton)"); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 786-87 (1986) (White, J., dissenting) (*stare decisis* "is essential if case-by-case judicial decision-making is to be reconciled with the principle of the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results").

In the present case, *Faretta* is significant because it is a precedent of this Court which fits the pattern described

above. It is *not* that *Faretta* – *a fortiori* – dictates that a defendant has a constitutional right to self-representation on direct appeal. *Faretta*'s significance is rather that the Court's rationale in that case cannot be disconnected from the web of other cases making up the Court's jurisprudence in the assistance of counsel area, of which *Faretta* has become an integral element.

This means that the variety of analytical principles which gave texture and force to *Faretta* at its drafting – including the notion that the right to counsel cannot be separated analytically from the right to self-representation, *see Faretta*, 422 U.S. at 819-20; or that individual autonomy must figure in any analysis on this score, *ibid.* – cannot be ignored when we consider other cases in the class of similar procedural contexts. That would be like interpreting Cambridge's "no dogs allowed" rule to permit the keeping of a bear. If the underlying coherence of the Court's assistance of counsel cases is an attribute we insist on, that commitment carries the vital implication that later cases be judged by the same standard. For this reason, it is not surprising that the most compelling justification for *departing* from a precedent is that it has become a "detriment to coherence and consistency in the law," *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989).

Viewed in this light, it appears that Respondent has misapprehended the role that *Faretta* plays in Petitioner's argument. Our use of *Faretta* is not a "major premise" from which our conclusion apodictically follows, in the way Respondent imagines. Rather, the rationale of *Faretta* is relevant here because the threads of its logic connect, in a wholly coherent way, to other assistance of counsel

cases decided by the Court – the line of decisions specifying the procedural stages at which the Court has determined that a right to counsel is constitutionally required. Pet. Brief at 20-25.

The procedural upper bound of that line of decisions is direct appeal of right, the juncture of the present case. As the Court's analyses over the years have shown, the right to counsel is recognized in these cases because the liberty interests of the defendant are deemed to override competing interests of the State. Certain strands of the rationale of *Faretta* fold into Petitioner's argument to establish that there is a logical correlation between the right to counsel and the right to proceed *pro se*, and there is no reason for thinking this connection should be broken when the procedural posture of the case changes from the trial level to direct appeal. Therefore, the rejection of the right to self-representation on direct appeal can come only at the cost of compromising the analytical integrity of the Court's framework of decisions in the right to counsel area, which is not an acceptable state of affairs.

Because of the logical priority that coherence holds in constitutional adjudicating by the Court, we are at a loss to understand Respondent's charge that Petitioner's analysis "directly conflicts" with "how constitutional rights are determined." Resp. Brief at 13. Moreover, not only must new decisions connect to earlier ones in a non-arbitrary way, but as noted above, the Court's decision to overrule a prior case is most typically animated by a discovery that it has become a "*detriment* to [the] coherence and consistency," *Patterson v. McLean Credit Union*,

491 U.S. at 173 (emphasis added), necessary for the relevant body of precedents to remain intelligible. *Faretta*'s presence in that framework poses no such danger.

II. CLASSIFYING DIRECT APPEALS WITH TRIAL-LEVEL PROCEEDINGS IS REQUIRED BY THE COURT'S RELEVANT DECISIONS.

Respondent argues alternatively that, even if the Court "declines to reexamine *Faretta* at this time," there are "significant differences between a trial and a first appeal" that preclude Petitioner's argument. Resp. Brief at 8. It is true that there are differences between a trial and an appeal, just as there are differences between a dog and a bear. Indeed, virtually any case can be differentiated from a separate case if certain attributes are considered and others ignored.

Respondent's analytical problem, however, is that the Court *already* has delimited the range of procedural contexts in which a defendant's right to counsel, if exercised, must be honored. As discussed in detail in Petitioner's Brief, that class of fact patterns includes first appeals of right. *See* Pet. Brief at 14-20. It is thus clear that, where the legal question involves the right to counsel *vel non*, direct appeals are deemed a part of the same class as trial proceedings. It follows that if the right to counsel and the right to dispense with counsel are logically correlative – a point Respondent does not contest – the right to elect self-representation on direct appeal must be countenanced. This is not, as Respondent suggests, an errant perspective of the constitutional right Petitioner asserts in this case. To the contrary, it is a candid acknowledgment of the logical implications of the Court's controlling decisions.

Accordingly, the second half of Respondent's Brief, which rates the interests of defendants against the State's interests in ensuring the correctness of its judgments and reducing administrative burdens, Resp. Brief at 19-30, cannot genuinely advance Respondent's position. Respondent's contentions on this score are characteristic of the claims nearly always pressed by States in defense of their own rules and procedures, and we do not question the social value of the interests Respondent urges. But the Court's holdings are unified by the principle that a defendant's due process interests are of a fundamental magnitude at least through the series of procedural stages bounded by first appeal of right. For cases that fall within that well-defined set, the interests of the State are secondary to those of the defendant, and thus cannot be overridden either by the State's own view of the requirements of fairness or its utilitarian concerns. *See* Pet.'s Brief at 16-20.

CONCLUSION

For these reasons, Respondent's arguments are not availing. The lower court's decision should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

SALVADOR MARTINEZ,

Petitioner,

v.

COURT OF APPEAL OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of California

MOTION AND BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN PARTIAL SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Does a criminal defendant have a constitutional right to elect self-representation on direct appeal from a judgment of conviction?

MOTION OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN PARTIAL SUPPORT OF PETITIONER

The National Association of Criminal Defense Lawyers (NACDL) moves the Court under Sup. Ct. R. 37.3(b) for leave to file the enclosed brief *amicus curiae* in support of petitioner Salvador Martinez. This motion is necessary because petitioner has failed to consent to the filing of the *amicus* brief. In support of the motion, NACDL states the following:

1. NACDL is a District of Columbia non-profit organization whose membership is comprised of over 10,000 lawyers and 28,000 affiliate members representing every state. Members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts.

2. NACDL is the only national bar organization working on behalf of public and private criminal defense lawyers. NACDL is dedicated to the preservation and improvement of our adversary system of justice. Thus, the members of NACDL have a vital interest in ensuring that the integrity of the criminal justice system is protected.

3. The defense bar, many defendants, the prosecution, the judiciary and the public all have an interest in clarification of the law concerning self-representation on

appeal. We ask leave to file our *amicus* brief in the belief that it may assist the Court.

Dated: June 30, 1999

Respectfully submitted,

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN PARTIAL SUPPORT OF PETITIONER

This *amicus* brief is filed pursuant to Rule 37 of the United States Supreme Court. The respondent granted *amicus* consent to file this brief, and the petitioner failed to respond to several communications requesting permission to file. The respondent's letter of consent has been filed with the clerk of the court.

INTEREST OF *AMICUS*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation which currently has a membership exceeding 10,000 attorneys with an additional 28,000 affiliate members in fifty states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the House of Delegates. NACDL was founded forty years ago to promote study and research in the field of criminal defense law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. Among NACDL's stated objectives is the proper administration of criminal justice. Thus, the

[1] In conformity with Rule 37.6, NACDL informs the Court that no counsel for any party to this matter authored the brief in whole or in part, and that no person or entity other than NACDL made a monetary contribution to the preparation or submission of the brief.

members of NACDL have a vital interest in ensuring that the integrity of the criminal justice system is protected.

INTRODUCTION

The members of NACDL are committed to preserving the right to assistance of counsel on appeal. In most cases, assistance of counsel is essential to preparation of the appellate record and to a meaningful appellate review.

Nevertheless, the right to the assistance of counsel on appeal is meaningful only if the right to reject ~~the~~ advice of counsel is also recognized. Counsel should not be forced on an unwilling appellant. A lawyer cannot provide effective assistance of counsel against an appellant's wishes. The core values underlying the Fifth and Sixth Amendments require that criminal appellants who do not wish to be represented by counsel, and who are competent to waive their right to counsel and to represent themselves, be allowed to do so, at least to the extent of submitting *pro se* briefs and motions.

ARGUMENT

A. Criminal Appellants May Have a Constitutional Right to Represent Themselves on Appeal Whether or Not There Is a Constitutional Right to Appeal a Conviction.

The California courts have held that a defendant has no right to self-representation on appeal, among other reasons because there is no constitutional right to appellate review of criminal convictions. *See People v. Scott*, 64 Cal. App. 4th 550, 557 (1998) (citing *McKane v. Durston*, 153 U.S. 684, 687-88 (1894), and *Price v. Johnston*, 334 U.S. 266, 285 (1948)) (*overruled McCleskey v. Zant*, 499 U.S. 467 (1991)); *In re Walker*, 56 Cal. App. 3d 225 (1976). The right to represent oneself on appeal does not necessarily depend upon a constitutional right to an appeal, however. Moreover, it may be time to re-examine the underlying premise that there is no right to an appeal.

This Court's decisions holding that "there is no constitutional right to an appeal" rest in part on the historic fact that no appeal as of right existed in criminal cases for the first century after the Court was created. *Abney v. United States*, 431 U.S. 651, 656 (1977). The right of appeal as it has developed since the late nineteenth century is purely statutory. *Id.*[2] This history, and the absence of any express mention in the Constitution of a right to appellate review of criminal convictions, has led to the conclusion

[2] Appeals as of right in criminal cases were first permitted in 1889 when Congress enacted legislation providing for appellate review of convictions resulting in the death penalty. *Abney*, 431 U.S. at 656 n.3.

that the Constitution does not require the states to provide appellate courts or a right to appellate review. *See id.; accord Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

By the mid-twentieth century, appellate review of criminal convictions had become "an integral part of the . . . criminal justice system for finally adjudicating the guilt or innocence" of all defendants. *Abney*, 431 U.S. at 656. Consequently, in *Griffin*, the Court held that both the Due Process and the Equal Protection Clauses protect all appellants, including the indigent, from "invidious discriminations" in all stages of appellate proceedings. *Griffin*, 351 U.S. at 18. The Constitution requires that appellate review, once established, be "adequate and effective" as well as nondiscriminatory, even though the Constitution does not require the States to provide appeals at all. *Id.* at 18, 20. In a line of cases applying these principles, the Court recognized that certain safeguards must be established to ensure that a criminal appellant's first appeal as of right is "adequate and effective." These safeguards include the right to appointed counsel and to the effective assistance of counsel. *See Evitts v. Lucey*, 469 U.S. 387 (1985); *Douglas v. California*, 372 U.S. 353, 356 (1963).

This Court has continued to acknowledge the key role of the first appeal of right when considering how far to extend these safeguards. It has determined that appointment of counsel is constitutionally required only through the first appeal of right, and does not extend to discretionary appeals and collateral attacks. *See Austin v. United States*, 513 U.S. 5, 6-8 (1994); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Ross v. Moffitt*, 417 U.S. 600 (1974).

Thirty years after the *Griffin* decision, Justice Brennan suggested that the Court may need to re-examine the proposition that there is no constitutional right to an appeal of a criminal conviction. *See Jones v. Barnes*, 463 U.S. 745, 755-64 (1983) (Brennan, J., dissenting). In *Jones*, the majority held that a lawyer representing a defendant in a direct criminal appeal does not have a constitutional duty to raise every non-frivolous issue requested by defendant. Justice Brennan (joined by Justice Marshall) disagreed with this holding and objected to the majority's assertion that there was no constitutional right to an appeal:

> The Court surprisingly announces that "[t]here is, of course, no constitutional right to an appeal." *Ante*, at 751, 77 L. Ed. 2d, at 993. That statement, besides being unnecessary to its decision, is quite arguably wrong. In *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 89, 76 S. Ct. 585, 55 ALR2d 1055 (1956), the fifth member of the majority, Justice Frankfurter, expressed doubt that there was a constitutional right to an appeal: "[N]either the unfolding content of 'due process' nor the particularized safeguards of the Bill of Rights disregard procedural ways that reflect a national historic policy. It is significant that no appeals from convictions in the federal courts were afforded (with roundabout exceptions negligible for present purposes) for nearly a hundred years; and, despite the civilized standards of criminal justice in modern England, there was no appeal from convictions (again, with exceptions not now pertinent) until 1907. Thus, it is now settled that due process of law does not require a State to afford review of

criminal judgments." *Id.*, at 20-21, 100 L. Ed. 891, 76 S. Ct. 585, 55 ALR2d 1055.

> If the question were to come before us in a proper case, I have little doubt that the passage of nearly 30 years since *Griffin* and some 90 years since *McKane v. Durston*, 153 U.S. 684, 38 L. Ed. 867, 14 S. Ct. 913 (1894), upon which Justice Frankfurter relied, would lead us to reassess the significance of the factors upon which Justice Frankfurter based his conclusion. I also have little doubt that we would decide that a State must afford at least some opportunity for review of convictions, whether through the familiar mechanism of appeal or through some form of collateral proceeding. There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property, and the reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction.

463 U.S. 745, 756 n.1 (citations omitted).

Justice Blackmun, writing separately, agreed that it was unclear whether a defendant had a constitutional right to an appeal:

> I do not join the Court's opinion, because I need not decide in this case . . . whether there is or is not a constitutional right to a first appeal of a criminal conviction, and because I agree with Justice Brennan, . . . that, as an *ethical* matter, an attorney should argue on appeal all non-frivolous claims upon which his client insists.

Id. at 754 (Blackmun, J., concurring in the judgment) (emphasis added).

Martinez may be a "proper case" in which to reassess whether "a State must afford at least some opportunity for review of convictions." As Justice Brennan commented in *Jones*, "a case presenting this question is unlikely to arise, for the very reason that a right of appeal is now universal for all significant criminal convictions." *Id.* at 756, n.1. The question may properly be addressed in this case because the assumption that there is no constitutional right to an appeal underlies some courts' conclusions that there is no right to self-representation on appeal. *See, e.g., Lumbert v. Finley*, 735 F.2d 239, 245 (7th Cir. 1984); *People v. Scott*, 64 Cal. App. 4th 550, 557 (1998) (*petition for cert. filed*, Dec. 28, 1998); *In re Walker*, 56 Cal. App. 3d 225, 227 (1976).[3]

Today, this assumption is questionable. Since the Court decided *Griffin* in 1955, it has continued to acknowledge the importance of appellate review in determining guilt or innocence. In *Evitts v. Lucey*, the Court wrote: "A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed." 469 U.S. at 399-400. As the Innocence Project based at Cardozo Law School has shown, a significant number of wrongful convictions occur in our criminal justice system. *See* "Forum Puts Face on Wrongful-Conviction Risk," 144

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[3] *But see People v. Ashley*, 59 Cal. 2d 339 (1963) (in automatic appeal in a death penalty case, counsel appointed over appellant's objections but appellant permitted to file *pro se* brief).

Chicago Daily Law Bulletin No. 224 (Nov. 16, 1998). Without appellate review of criminal convictions, the risk of erroneous convictions would be truly unacceptable.

The Constitution is not frozen in time. Today, criminal appellate review is universal and it has become "an integral part of determining guilt or innocence." Due process requires appellate review of all felony convictions. *See id.* at 468-69; *Evitts v. Lucey*, 469 U.S. at 399-400.

B. Even If Defendants Have No "Absolute Right" to Be Physically Present and to Argue Their Appeals in Person, They Have a Right to Present Their Claims In *Pro Se* Under Certain Circumstances.

In *Price v. Johnston*, 334 U.S. 266, 285 (1948), the Court stated that in contrast to the well-recognized right to be present at significant stages of a prosecution, "a prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court." The Court acknowledged this distinction in *Faretta v. California*, 422 U.S. 806, 816 (1975), which suggests that the right to be present at significant stages of the prosecution and to represent oneself, guaranteed by the Sixth Amendment, may not extend to appeals. These decisions, however, do not foreclose the possibility that a criminal appellant may have at least a limited right to self-representation.

Price did not arise in the context of a direct appeal. It was a habeas case. Price was appealing the denial of his fourth federal habeas petition challenging a state conviction. He had no attorney and wanted to argue his appeal

in person at the Court of Appeals. 334 U.S. at 270-76. This Court held that the circuit courts have discretionary power to grant a prisoner's request to be brought to court to argue his own appeal:

> The discretionary nature of the power in question grows out of the fact that a prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court. The absence of that right is in sharp contrast to his constitutional prerogative of being present in person at each significant stage of a felony prosecution, and to his recognized privilege of conducting his own defense at the trial. . . . Oral argument on appeal is not an essential ingredient of due process and [the federal statutory right to argue one's own appeal] may be circumscribed as to prisoners where reasonable necessity so dictates.

334 U.S. at 285-86 (citations omitted).

The Court acknowledged that "[e]xceptional situations may arise where a circuit court of appeals might fairly conclude that oral argument by a prisoner in person is 'reasonably necessary in the interests of justice' " *Id.* at 280 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942)). Where the court deemed argument essential, for example, "fairness and orderly appellate procedure demand that both parties be accorded an equal opportunity to participate in the argument either through counsel or in person." *Id.*

The Court then considered what if, in a particular case, it deems argument important, but

> one of the parties is a prisoner and has no lawyer and who desires that none be appointed to represent him, being of the belief that the case is of such a nature that only he himself can adequately discuss the facts and issues. *Since ordinarily the court cannot designate counsel for the prisoner without his consent*, an arrangement that is made for his presence and participation in the oral argument can be said to be "reasonably necessary in the interests of justice."

Id. at 280 (emphasis added).

The Court concluded that under such circumstances, a circuit court would be required, pursuant to its statutory power to issue writs "necessary" for the exercise of its jurisdiction, to permit the prisoner to argue his own appeal. *Id.*

Thus, while the *Price* opinion held that the Constitution did not guarantee an "absolute right" to argue one's own appeal in person, the Court also acknowledged that counsel could not be forced on an appellant and that circumstances might arise that would require the court, in order to perform a meaningful review, to permit a *pro se* appellant to argue in person.

C. Because Appellate Counsel Is Not Required to Raise Every Non-Frivolous Issue, Appellants Should Be Permitted to Present Claims Not Briefed by Counsel to the Court.

Many lower courts have concluded that even though appellants have no constitutional right to argue their appeal in person, they have a right to file *pro se* briefs and motions. *See, e.g., Vega v. Johnson*, 149 F.3d 354, 361 (5th

Cir. 1998) (although extent of right of self-representation on appeal is unclear in Texas and in the Fifth Circuit, "[a] defendant does have a right to submit briefs pro se on appeal") (citing *Myers v. Collins*, 8 F.3d 249, 252 (5th Cir. 1993); *United States v. Gillis*, 773 F.2d 549, 560 (4th Cir. 1985) (court denied appellant leave to proceed *pro se* and appointed counsel, but permitted appellant to file a *pro se* supplemental brief); *Chamberlain v. Erickson*, 744 F.2d 628, 630 n.5 (8th Cir. 1984) (no constitutionally protected right to argue in person but appellants have right to file *pro se* briefs and motions); *Horton v. Dugger*, 895 F.2d 714, 718 (11th Cir. 1990) (*habeas* petitioner was not denied right to self-representation on direct appeal, where the record did not indicate that he was denied permission to file a *pro se* brief (citing *Chamberlain*)); *Hines v. Enomoto*, 658 F.2d 667 (9th Cir. 1981) (appointed counsel not improperly forced upon appellant in state appellate proceedings where appellant allowed to file supplemental brief).

This distinction between argument and briefing is sound. Even if the right to self-representation in a "criminal prosecution" guaranteed by the Sixth Amendment does not extend to the direct appeal of a conviction, appellants may have a constitutional right to present to the court, in writing, claims that they may be unable to present through counsel for a variety of reasons. Counsel may decline to press certain claims. The Court has held that counsel has no constitutional duty to present every non-frivolous claim an appellant wishes to raise, and does not provide ineffective assistance by selecting the claims that counsel believes are the strongest. *Jones v. Barnes*, 463 U.S. 745 (1983). Yet today, if a claim is not raised on direct appeal, and appellant cannot establish

that appellate counsel was ineffective in not raising it, the chances of obtaining review of that claim on the merits in habeas proceedings are slim in many jurisdictions. A supplemental *pro se* brief may be the only way for an appellant to preserve potentially meritorious claims for further post-conviction review.

Where appellate counsel declines to press an innocence claim or other claims that appellant wants to raise, where a conflict arises between lawyer and client, or where counsel renders ineffective assistance, substitution of counsel should be possible, but in practice it is not always granted. Moreover, appellants who can afford to hire an attorney will have more control over the way their cases are presented than do people who are represented by appointed counsel. *See Jones*, 463 U.S. at 757-58 n.2 (Brennan, J., dissenting). Given this reality, the Equal Protection Clause, as well as the Due Process Clause, require that an indigent appellant be allowed to file a supplemental brief presenting issues his lawyer chooses not to raise. Leave to argue in person, *pro se*, need be granted only if argument is necessary to decide the case and appellant believes his interests cannot be represented adequately through counsel.

D. The Right to Self-Representation, Like the Right to Counsel, Reflect Fundamental Values Requiring That the Dignity and Autonomy of the Individual Be Respected in Criminal Proceedings.

In *Jones v. Barnes*, Justice Brennan offered several examples of possible reasons why an appellant would want to proceed *pro se*:

> [Appellant] may want to press the argument that he is innocent, even if other stratagems are more likely to result in the dismissal of charges or in a reduction of punishment. He may want to insist on certain arguments for political reasons. He may want to protect third parties. This is just as true on appeal as at trial. . . .

463 U.S. at 759. Pressing a claim of innocence could, of course, be of paramount importance to a defendant who later seeks federal *habeas* review of his conviction.

Regardless of the claims involved, the right to counsel

> . . . is more than a right to have one's case presented competently and effectively. It is predicated on the view that the function of counsel under the Sixth Amendment is to protect the dignity and autonomy of a person on trial by *assisting* him in making choices that are his to make, not to make choices for him, although counsel may be better able to decide which tactics will be most effective for the defendant. . . .

Jones v. Barnes, 463 U.S. at 758 (emphasis added). This is just as true on appeal as at trial.

As Justice Brennan pointed out so eloquently in *Jones*, *Anders* reflects this same view. When appointed counsel believes there are no meritorious issues to raise on appeal, counsel must prepare a brief "covering all arguable grounds for appeal so that the client may 'raise any points that he chooses.' " *Id.* (quoting *Anders v. California*, 386 U.S. 738, 744 (1967)). This approach protects the right to counsel without impairing the right of self-representation.

The right to counsel, important as it is, "is intended to supplement the other rights of the defendant, and not to impair the 'absolute and primary right to conduct one's own defense in propria persona.' " *Faretta*, 422 U.S. at 817 (quoting *United States v. Plattner*, 330 F.2d 271, 274 (2d Cir. 1964)). Whatever the relative importance of the specific rights enumerated in the Bill of Rights, they are all intended to protect the dignity and autonomy of each person. These basic values are applicable on appeal, just as they are at trial. *See Anders*, 386 U.S. at 742.

E. The Right to Self-Representation Should Not Be Used to Undermine the Right to Effective Assistance of Counsel.

NACDL is concerned about protecting and preserving the right to assistance of counsel on appeal. Conflicts between lawyer and client or other circumstances sometimes make it impossible for counsel to render effective assistance. Sometimes courts deny reasonable requests for substitution because they want to avoid delays and to contain the cost of legal services to indigent appellants. At times, it may be difficult for the court to evaluate

whether the reasons for requesting substitution are valid, because appellant and his lawyer cannot reveal much information about the nature of their differences. Despite these problems, courts should look carefully at requests for substitution of counsel and consider whether the right to effective assistance is implicated. Appellants should not be forced to choose between ineffective assistance of counsel and proceeding *pro se*, *see Hendricks v. Zenon*, 993 F.2d 664 (9th Cir. 1993), nor should they be denied assistance of counsel in the name of the right to self-representation.

CONCLUSION

If the Court recognizes a right to self-representation on appeal, safeguards similar to those set forth in *Faretta* should be required. A waiver of the right to appointed counsel should be accepted only if it is express, unequivocal, knowing and voluntary; if the dangers and disadvantages of self-representation have been explained and understood, and if appellant is capable of presenting appeal to the court in writing. *See Baker v. Kaiser*, 929 F.2d 1495 (10th Cir. 1991); *Campbell v. Blodgett*, 940 F.2d 549 (9th Cir. 1991).

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IN THE

Supreme Court of the United States

SALVADOR MARTINEZ,

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vs.

COURT OF APPEAL OF CALIFORNIA,
FOURTH APPELLATE DISTRICT,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does the right of self-representation under *Faretta* v. *California* extend to the first appeal as of right?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the potential expansion of the right to self-representation to the first appeal. The waste, delay,

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

confusion, and potential for manipulation that would be caused by recognizing a right to represent oneself on appeal are contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The defendant was convicted by a jury of fraudulent appropriation of the property of another. See Brief for Petitioner 2. He represented himself throughout his trial. *Ibid.* The jury also found that he had three prior convictions within the meaning of California's "three strikes" law, Cal. Penal Code §§ 667(d), 667(e)(2), 1170.12(b), and 1170.12(c)(2). Brief in Opposition 1. The defendant was sentenced to 25-years-to-life in state prison. *Ibid.*

A notice of appeal was filed on September 3, 1998. His request to proceed *pro se* was denied by the Court of Appeal on October 16, 1998, under the authority of *In re Walker*, 56 Cal. App. 3d 225, 228-229, 128 Cal. Rptr. 291, 293 (1976). Brief for Petitioner 2. Defendant filed a petition for writ of mandate with the California Supreme Court which was denied on November 18, 1998. App. to Pet. for Cert. This Court granted certiorari on April 19, 1999.

SUMMARY OF ARGUMENT

Faretta v. California does not control the present case. As defendant concedes, *Faretta*'s Sixth Amendment right can do no more than inform the analysis of the present case as the right to appellate counsel is derived from the Fourteenth Amendment's equal protection and due process guarantees.

Faretta is inseparable from the Sixth Amendment's fair trial guarantees. This self-admittedly close decision invoked history, current practice, and the structure of the Sixth Amendment. Although the persuasive historical and modern support for *pro se* representation was important, self-representation's absence

from the Sixth Amendment had to be explained. This could only be done by examining the structure of the Sixth Amendment, which grants a defendant the right to stand alone at trial.

Faretta's Sixth Amendment rule cannot be transplanted to the right to counsel on appeal. The right to self-representation on appeal cannot be inferred mechanically from defendant's appellate rights. If it exists, this right must be supported by precedent, history, and the structure of the right to appellate counsel.

Extending *Faretta* to appeal fails on all three counts. The closest precedents are hostile to extending trial rights to the appeal, and a substantial body of authority rejects the right to self-representation on appeal.

The historical case for self-representation is much weaker for the appeal than the trial. There was no right to appeal convictions at common law, and Congress did not allow criminal appeals in federal criminal cases for over 100 years. The little historical evidence that does exist is hostile to self-representation on appeal.

Neither due process nor equal protection support extending *Faretta* to appeals. Since the vast majority of *pro se* appellants will be injured by their choice, it is difficult to see how due process protects a right to legal self-destruction. The fact that a defendant's choice is limited by the California rule does not violate due process, because the state can prevent a defendant from waiving constitutional rights. It can do so here, where it could not in *Faretta*, because of the fundamental difference between trial and appeal under due process.

An equal protection attack on the California rule fails because the rule does not disadvantage defendant. The *Griffin-Douglas* line of cases seeks to ensure defendants have adequate access to the courts for making the first appeal. Since counsel will almost always provide better access to the courts than self-representation, the California approach is consistent with equal protection.

Faretta should not be extended by even a fraction of an inch. *Faretta*'s value as precedent is on thin ice. Its ambiguous standard is difficult to administer, giving manipulative defendants opportunities to create reversible error. *Faretta* wastes time and resources; it is too often invoked by those least capable of representing themselves, turning trials into demeaning farces.

These problems would be exacerbated on appeal. Defendants are even less capable of representing themselves on appeal than at trial. Extending *Faretta* to appeals will likely include a right to appear for oral argument, creating new risks for the appellate courts. There must be compelling justification to extend *Faretta*'s difficult standard, and none exists here.

ARGUMENT

I. *Faretta* is inseparable from the Sixth Amendment's fair trial guarantees.

Faretta v. *California*, 422 U. S. 806 (1975) does not govern the present case. As defendant effectively concedes, *Faretta*'s Sixth Amendment right to self-representation can do no more than inform the analysis in the present case.[2] The Sixth Amendment does not govern the right to appellate counsel; that right is derived from due process and equal protection. See

2. "*Faretta*'s rationale is significant for the instant case, not because the right to self-representation which the Court located in the Sixth Amendment applies to direct appeals of right *through* that Amendment . . . ." Brief for Petitioner 25 (emphasis in original). The concession is well taken. The Sixth Amendment right to counsel must be viewed in the context of the Sixth Amendment. As all other Sixth Amendment rights—jury trial, confrontation, speedy and public trial, knowledge of the charges and compulsory process, see U. S. Const., Amdt. 6—are only relevant to the trial, the Sixth Amendment right to counsel is similarly limited to the trial. See Pritchard, Auctioning Justice: Legal and Market Mechanisms of Allocating Criminal Appellate Counsel, 34 Am. Crim. L. Rev. 1161, 1182 (1997).

Ross v. *Moffitt*, 417 U. S. 600, 608-609 (1974). Since *Faretta* is so closely tied to the Sixth Amendment's fair trial guarantees, it is unlikely to thrive in the different soil of the equal protection/due process rationale of the right to appellate counsel.

As *Faretta* itself recognized, even at trial the constitutional question was a close one. 422 U. S., at 807. If "a lawyer who represents himself has a fool for a client," *Kay* v. *Ehrler*, 499 U. S. 432, 438 (1991), then the self-represented lay defendant is in a far worse situation. This Court has consistently recognized that the unrepresented lay defendant is at a great disadvantage at trial. See, *e.g.*, *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932); *Gideon* v. *Wainwright*, 372 U. S. 335, 344-345 (1963); *Evitts* v. *Lucey*, 469 U. S. 387, 394 (1985). The decision to "bestow[] a *constitutional* right on one to make a fool of himself," *Faretta*, 422 U. S., at 852 (emphasis added) (Blackmun, J., dissenting), required extensive justification. See generally Decker, The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After *Faretta*, 6 Seton Hall Const. L. J. 483 (1996).

Inferring self-representation from the Sixth Amendment right to counsel was only possible after a broad and detailed analysis. *Faretta* began its analysis by noting the long federal tradition of self-representation, starting with section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92, now codified at 28 U. S. C. § 1654, which was enacted by the same Congress that proposed the Sixth Amendment. *Faretta*, *supra*, 422 U. S., at 812-813. This practice was adopted by the overwhelming majority of the states. *Id.*, at 813-814, and nn. 9, 10.

Faretta also found support in decisions giving a defendant control of his defense. In *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 279 (1942), the defendant was allowed to plead guilty to a felony without first having the approval of counsel, referring to a right to dispense with counsel as "correlative" to the right to assistance of counsel. See *Faretta*, *supra*, 422 U. S., at 814-815. Similar support was found in the

defendant's right to be present at trial, as his presence gave him the power " 'to give advice or suggestions or even to supersede his lawyers altogether and conduct the trial himself.' " *Id.*, at 816 (emphasis omitted) (quoting *Snyder* v. *Massachusetts*, 291 U. S. 97, 106 (1934)). These precedents were supplemented by pervasive federal circuit court authority supporting the right to self-representation at trial. See *id.*, at 816-817. The *Faretta* Court thus found a "nearly universal conviction, on the part of our people as well as our courts," that the defendant was entitled to represent himself at trial, *id.*, at 817, which was "a consensus not easily ignored." *Ibid.*

History also played a role in the *Faretta* decision. The Court noted that self-representation predated the right to counsel at trial under the common law, and in fact was mandatory for serious crimes. See *id.*, at 823. The colonies were initially even more insistent upon self-representation than England. *Id.*, at 826. As the right to counsel developed on both sides of the Atlantic, self-representation was retained as an option. See *id.*, at 825-828.

In addition to history and precedent, the *Faretta* Court was necessarily concerned with fidelity to the text of the Sixth Amendment. Although the Sixth Amendment and the Judiciary Act of 1789 that recognized self-representation were passed by the same Congress, see *id.*, at 812-813, the Sixth Amendment explicitly recognized only the right to counsel. This raised the potential inference that the framers did not deem self-representation fundamental, and chose to exclude it from the Constitution. See *id.*, at 844 (Burger, C.J., dissenting). While this Court occasionally infers constitutional rights from general language, particularly under due process, see *id.*, at 819, n. 15 (majority opinion), this "is not, of course, a mechanistic exercise." *Ibid.* Because " '[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right,' " *ibid.* (quoting *Singer* v. *United States*, 380 U. S. 24, 34-35 (1965)), *Faretta*'s difficult

question, see *id.*, at 807, was made even more so by its absence from the text of the Sixth Amendment.

The *Faretta* majority's answer to the textual problem was based on the structure of the Sixth Amendment's trial rights. The control and responsibility for one's own defense that the Sixth Amendment grants to defendant provided the textual foundation for the right to self-representation. Confrontation, compulsory process, and information on the nature of the charges are personal rights of the defendant under the Sixth Amendment. "The Sixth Amendment does not provide merely that a defense shall be made for an accused; it grants the accused *personally* to make the right to his defense." *Id.*, at 819 (emphasis added). These personal rights are derived from what is at stake in the trial. "The right to defend is given directly to the accused; for it is he who suffers the consequence if the defense fails." *Id.*, at 819-820. This allows a defendant to take the ultimate personal responsibility for his defense. *Faretta* preserves defendant's "moral right to stand alone in his hour of trial." *United States* v. *Dougherty*, 473 F. 2d 1113, 1128 (CADC 1972); Damaska, Structures of Authority and Comparative Criminal Procedure, 84 Yale L. J. 480, 537 (1975).

This is the key to *Faretta*'s analysis. The other justifications for the *Faretta* rule, although important, were not decisive in a case this close. While there is a historical tradition of self-representation at trial, the historical support for a right to represent oneself is not compelling in light of its absence from the Sixth Amendment. Tradition alone does not erect a constitutional barrier against a state's decision to depart from tradition. See, *e.g.*, *Hurtado* v. *California*, 110 U. S. 516, 528-529 (1884). Self-representation's prevalence was also an insufficient explanation for the *Faretta* right. Widespread acceptance of a practice, like tradition, does not automatically transform it into a constitutional right. See, *e.g.*, *Martin* v. *Ohio*, 480 U. S. 228, 236 (1987); *Patterson* v. *New York*, 432 U. S. 197, 211 (1977); cf. *California* v. *Green*, 399 U. S. 149, 184-185 (1970) (Harlan J., concurring) (Confrontation Clause

should not impose a uniform rule of hearsay, which would eliminate state experimentation). Therefore, the constitutional basis for the right to self-representation had to be in "the structure of the Sixth Amendment . . . ." *Faretta*, *supra*, 422 U. S., at 818.

Faretta's structural interpretation of the Sixth Amendment turns on the importance of the trial to the defendant. This Court's habeas cases have distinguished the trial, as the " 'main event' " at which a defendant's rights are to be determined, from the necessarily collateral habeas proceedings. *McFarland* v. *Scott*, 512 U. S. 849, 859 (1994) (quoting *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983)); see also *Wainwright* v. *Sykes*, 433 U. S. 72, 90 (1977) (distinguishing trial "as a decisive and portentous event"). The appeal, like habeas, is also less critical than trial, once again under "the principle that a trial on the merits, whether in a civil or criminal case, is the 'main event' and not simply a 'try out on the road' to appellate review." *Freytag* v. *Commissioner*, 501 U. S. 868, 895 (1991) (Scalia, J., concurring) (quoting *Sykes*, *supra*).

The criminal trial is the "main event" because the defendant has so much at stake. It is where the State tries "to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt." *Ross* v. *Moffitt*, 417 U. S. 600, 610 (1974). Thus, "while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all." *Id.*, at 611; see *McKane* v. *Durston*, 153 U. S. 684, 687 (1894).

Because the defendant has everything to lose at trial, he or she has the right of self-representation. Under the Sixth Amendment's guarantee of the trial as the central proceeding, a defendant who chooses to take ultimate responsibility for his or her defense, must be allowed to do so. Cf. *McCaskle* v. *Wiggins*, 465 U. S. 168, 177, n. 8 (1984) (defendant cannot complain about the quality of his self-representation). Any other result "and the right to make a defense is stripped of the

personal character upon which the Amendment insists." *Faretta*, *supra*, 422 U. S., at 820. The special protection and responsibility given to the defendant by the Sixth Amendment due to the singular importance of the trial is the heart of the *Faretta* ruling, which cannot be transplanted to the appeal.

II. *Faretta*'s Sixth Amendment rule cannot be transplanted to the right to counsel on appeal.

Although defendant concedes that *Faretta* does not control the present case, see *supra*, at n. 2, he attempts a wholesale transfer of *Faretta*'s reasoning to the first appeal by equating the first appeal with the trial. See Brief for Petitioner 25. This overstates the importance of the first appeal. In coming to this conclusion, defendant makes an analytical error that the *Faretta* Court warned against—mechanically inferring one right from another. See *Faretta* v. *California*, 422 U. S. 806, 820, n. 15 (1975). The right to insist upon the opposite of an enumerated constitutional right is the exception rather than the rule. *Id.*, at 819, n. 15; see *supra*, at 6. The *Faretta* Court examined precedent, history, and the structure of the relevant constitutional text before inferring the right to self-representation. See *supra*, at 5-8. Applying a similar analysis to the present case shows that the *Faretta* rationale does not apply to the first appeal. *Faretta* stands on three legs, none of which supports its extension to appeals.

A. Precedent.

Precedent does not support extending the right to self-representation to the first appeal. The closest precedents to the present case disfavor the right to self-representation on appeal. In *Price* v. *Johnston*, 334 U. S. 266 (1948), overruled on other grounds in *McCleskey* v. *Zant*, 499 U. S. 467, 483 (1991), a federal prisoner in Alcatraz, who was representing himself on his fourth habeas petition, sought to appear before the Ninth Circuit en banc in order to reargue his appeal. See *id.*, at 276.

The Ninth Circuit held that the circuit courts did not have the power to order the prisoner's presence for oral argument. *Ibid.*

This Court reversed, finding that the courts of appeals had the discretionary authority under the All Writs Act to require a defendant's presence to argue his or her appeal. *Id.*, at 278. The discretionary nature of this power demonstrates that *pro se* representation on appeal is a matter of grace and not of right.

> "The discretionary nature of the power in question grows out of the fact that a prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court. [Citation.] The absence of that right is in *sharp contrast* to his constitutional prerogative of being present in person at each significant stage of a felony prosecution, [footnote and citation] and to his *recognized privilege of conducting his own defense at the trial.* Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Id.*, at 285 (emphasis added).

The importance of this passage to the present case is reinforced by *Faretta*, which quotes the words italicized above and favorably cites the passage for the purpose of distinguishing the trial from post-trial proceedings. See *Faretta*, *supra*, 422 U. S., at 816.

Although *Price* does not directly control the present case, it does provide an important counterpoint to *Faretta*. As in the present case, the *Faretta* Court found that there was no controlling authority on the right to self-representation. *Faretta* did, however, find statements from this Court's decisions strongly supportive of a trial right to self-representation. See 422 U. S., at 814-815; *supra*, at 5-6. *Price* provides similar support for the opposite result in the present case, with added value of approval from *Faretta*.

Price, in turn, finds support in *Schwab* v. *Berggren*, 143 U. S. 442 (1892). Schwab asserted that the common law right

to be present and speak on his behalf when the trial court pronounces a death sentence, see *id.*, at 446-447; see 4 W. Blackstone, Commentaries 368 (1st ed. 1769), applied to an appellate court issuing an order affirming his death sentence. 143 U. S., at 446. This Court rejected the claim, holding that due process does not require defendant's presence before the appellate court, particularly when he has counsel. *Id.*, at 449. More importantly, *Schwab* noted the general distinction between defendant's trial and appellate rights:

> "This objection is founded upon an erroneous idea of a criminal trial, and of the power and duty of this court in such a case brought before it by appeal. The Constitution provides that a defendant in a criminal action shall be informed of the accusation against him, and shall have the right to confront the accusers and witnesses with other testimony, and shall not be convicted except by the unanimous verdict of a jury of good and lawful men in open court as heretofore used. *That* is his *trial*. This of course, implies that he shall have a right to be present. If he complains of any error in his trial, the record of the trial is transmitted to this court. *Here*, are no 'accusers,' no 'witnesses,' and no 'jury;' but upon inspection of the record this court decides whether there was error in the trial, and without rendering any judgment, orders its decision to be certified to the court below. It has never been understood, nor has it been the practice that the defendant shall be present in *this* court; nor is he ever 'convicted' here." *Id.*, at 450 (quoting *State* v. *Overton*, 77 N. C. 485, 486 (1877)) (emphasis in original).

The *Schwab* Court found this "not only consistent with 'due process of law'—giving those words their most liberal interpretation—but is founded on a wise public policy." *Id.*, at 451.

The *Faretta* Court also relied on the very strong majority rule in both the state and the federal systems granting the right to self-representation at trial. See *supra*, at 5. There is no similar consensus for extending *Faretta* to the first appeal. The

states and the federal circuits are split over this issue. Compare *United States* v. *Gillis*, 773 F. 2d 549, 560 (CA4 1985); *Lumbert* v. *Finley*, 735 F. 2d 239, 245-246 (CA7 1984); *Blandino* v. *State*, 914 P. 2d 624, 626 (Nev. 1996); *Hill* v. *State*, 656 So. 2d 1271, 1272 (Fla. 1995) (no right to self-representation on appeal), with *Chamberlin* v. *Erickson*, 744 F. 2d 628, 630 (CA8 1984) (right to file *pro se* brief but not participate in oral argument); *United States* v. *Grimes*, 426 F. 2d 706, 707 (CA5 1970) (recognizing right but not addressing whether it is constitutionally based); *United States* v. *Wagner*, 158 F. 3d 901, 902 (CA5 1998) (constitutional and statutory right); *United States* v. *O'Clair*, 451 F. 2d 485, 486 (CA1 1972) (stating defendant may conduct his own appeal "[i]f he feels qualified"; no constitutional basis stated); *Gidron* v. *State*, 850 S. W. 2d 331, 332-333 (Ark. 1993) (by state rule of court); *Hathorn* v. *State*, 848 S. W. 2d 101, 123 (Tex. Crim. App. 1992) (right to *pro se* appeal); *State* v. *Warner*, 594 So. 2d 397, 402 (La. App. 1991) (constitutional, but no right to oral argument); *Webb* v. *State*, 412 N. E. 2d 790, 792 (Ind. 1980). See Decker, The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After *Faretta*, 6 Seton Hall Const. L. J. 483, 591-594 (1996); Krikava & Winking, The Right of an Indigent Criminal Defendant to Proceed *Pro Se* on Appeal: By Statute or Constitution, A Necessary Evil, 15 Wm. Mitchell L. Rev. 103, 113-114 (1989). While self-representation may have some numerical edge, it is not close to the near unanimity found in *Faretta*.

In contrast to *Faretta*, the Court in *Singer* v. *United States*, 380 U. S. 24, 36-37 (1965) noted a deep split of authority in the states regarding whether a defendant could reject jury trial and insist on a bench trial. The present case is more like *Singer* than *Faretta*. The path the defendant asks this Court to follow is not Justice Jackson's "beaten path." Cf. Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1, 26 (1945); *Faretta*, *supra*, 422 U. S., at 817. The path to rejecting the right to self-representation on appeal is also well trodden, and, in light of *Price* and *Schwab*, much

clearer. A defendant's desire to represent himself cannot stand on this leg of *Faretta*'s tripod.

B. History.

The historical case for self-representation is much weaker for the appeal than for the trial. At common law, there was no right to appeal in criminal cases. See 1 J. Stephen, A History of the Criminal Law of England 308-309 (1883) ("no appeal properly so called" and "writs of error . . . entirely as a matter of favour" on very limited grounds). Indeed, with a few exceptions, appeals were not permitted from federal convictions for over 100 years, and England followed a similar practice until 1907. *Griffin* v. *Illinois*, 351 U. S. 12, 21 (1956) (Frankfurter, J., concurring in the judgment). The historical case for a right to self-representation on an appeal is significantly undercut by the nonexistence of appellate review in most criminal cases throughout much of our legal history.

The little historical evidence that exists is contrary to the right to self-representation on appeal. When criminal appeals became common in the late nineteenth century, a sharp line was drawn between trial and appeal. Because there was no right to an appeal, the state could condition its gift as it saw fit. "It is wholly within the discretion of the state to allow or not allow such a review . . . . ¶ It is, therefore, clear that the right to appeal may be accorded by the state to the accused upon such terms as in its wisdom may be deemed proper." *McKane* v. *Durston*, 153 U. S. 684, 687-688 (1894). The limited appellate rights were in sharp contrast with the numerous trial rights. See *Schwab*, *supra*, 143 U. S., at 450.

When the practice of appeals in criminal cases finally developed, the state could have forbidden defendant from proceeding *pro se*. Even if it were allowed, this practice could not have been seen as a fundamental right. Until this Court began the constitutional regulation of criminal appeals in *Griffin*, *supra*, and *Douglas* v. *California*, 372 U. S. 353 (1963), state discretion over appellate procedures was unchal-

lenged. The constitutional limitations of *Douglas* and *Griffin*, while relevant to the structural analysis of the right to appeal, do not affect the historical case. If *Faretta* is to extend to appeals, it must do so under a structural analysis of the due process/equal protection foundation of *Douglas*, *Griffin*, and their progeny.

C. Structure.

The present case demands a more involved structural analysis than was found in *Faretta*. *Faretta*'s trial right was inferred from the Sixth Amendment right to counsel, the sole purpose of which is to protect the right to a fair trial. See *Faretta*, *supra*, 422 U. S., at 818-819; *Wheat* v. *United States*, 486 U. S. 153, 158-159 (1988). The right to appellate counsel, on the other hand, is derived from due process and equal protection principles guaranteeing equal access to the courts. See *Evitts* v. *Lucey*, 469 U. S. 387, 393 (1985).[3] Although rights not literally expressed in the Constitution can be inferred from due process, see *Faretta*, 422 U. S., at 819, n. 15, the defendant asks too much in this case. The right to appellate

3. This Court's occasional reference to the Sixth Amendment right of counsel in the context of the appeal, see, *e.g.*, *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986), does not change the source of the right to appellate counsel. *Carrier* dealt with errors of counsel in the first appeal as cause for state procedural default on federal habeas corpus. See *id.*, at 481-483. The Court held that so long as defendants did not receive ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U. S. 668 (1984), they would bear the risk of attorney error. 477 U. S., at 488. It also noted that when procedural default is the result of constitutionally ineffective assistance of counsel, the Sixth Amendment imputes responsibility to the state. *Ibid.* The distinction between the Sixth Amendment and due process did not matter because the defendant in *Carrier* admitted that counsel's error did not fall below the constitutional standard. See *id.*, at 497. Since *Carrier* did not need to examine the source of the right to appellate counsel with care, it does not change the substantial authority supporting equal protection and due process as the sources of this right. See *Cohens* v. *Virginia*, 6 Wheat. (19 U. S.) 264, 399 (1821).

counsel is contingent upon the State providing the right to appeal, a benefit it does not have to give. Extending *Faretta* to appeals would add another inference. Rights can be extended or inferred only so far. See, *e.g.*, *Davis* v. *United States*, 512 U. S. 452, 462 (1994) (declining to add a "third layer of prophylaxis" to the privilege against self-incrimination). "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added." *Douglas* v. *Jeannette*, 319 U. S. 157, 181 (1943) (Jackson, J., concurring and dissenting).

In *Ross* v. *Moffitt*, 417 U. S. 600 (1974), another attempt to extend the appellate rights, the Court analyzed the defendant's request separately under due process and equal protection. See *id.*, at 609-616. A similar analysis will show the weakness of defendant's claim in the present case.

1. Due Process.

The due process component of the appellate rights cases analyzes the fairness between the individual and the state. See *Evitts*, *supra*, 469 U. S., at 405. Courts in these cases are looking for a lack of fundamental fairness before they invoke due process to intervene in appellate procedure. See *Pennsylvania* v. *Finley*, 481 U. S. 551, 556 (1987). This Court does not seek to impose its own view of proper appellate procedure on the states or Congress, but to keep appellate review "free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi* v. *Yeager*, 384 U. S. 305, 310 (1966). The search for fundamental unfairness must take into account the principles that due process does not give a defendant an entitlement to the most favorable result, see *Medina* v. *California*, 505 U. S. 437, 451 (1992), and that the states are accorded considerable deference when deciding the structure of their appellate systems. See *Johnson* v. *Fankell*, 520 U. S. 911, 922, n. 13 (1997).

Fundamental fairness imposes few rules of criminal procedure outside the enumerated rights set forth in the other provisions of the Bill of Rights.

> "In the field of criminal law, we 'have defined the category of infractions that violate "fundamental fairness" very narrowly' based on the recognition that, '[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.' *Dowling* v. *United States*, 493 U. S. 342, 352 (1990); accord, *United States* v. *Lovasco*, 431 U. S. 783, 790 (1977). The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order. As we said in *Spencer* v. *Texas*, 385 U. S. 554, 564 (1967), 'it has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.' " *Medina*, *supra*, 505 U. S., at 443-444.

Fundamental fairness does not justify extending *Faretta* to appeals. The vast majority of *pro se* appellants will be injured rather than aided by their choice. As bad as self-representation is at trial, see *supra*, at 5, it is an even worse option for the appellate defendant. At trial, the lawyerless defendant at least has a chance to argue the facts to a jury of fellow laymen and try to convince them of the unjustness of convicting him. See *Faretta*, *supra*, 422 U. S., at 829, n. 37 (describing trial of William Penn). A defendant on appeal does not have this luxury. Appellate courts rarely address purely factual issues, and then under standards tilted heavily toward affirmance. See, *e.g.*, *Jackson* v. *Virginia*, 443 U. S. 307, 319 (1979) (" . . . whether, after viewing the evidence in the light more favorable to the prosecution, *any* rational trier of fact could have found . . . " (emphasis in original)). Attack on the conviction or the

law underlying it must generally be made through legal arguments, not fact-based claims or appeals to an amorphous sense of justice.

A defendant who has no counsel on appeal "has only the right to a meaningless ritual . . . ." *Douglas* v. *California*, *supra*, 372 U. S., at 358. When the right to appellate counsel is premised upon fundamental fairness between the individual and the state, see *Ross*, *supra*, 417 U. S., at 609, it makes no sense to invoke these principles to give the defendant such a "right."

Defendant attempts to raise the specter of unfairness by claiming that California's rule unconstitutionally restricts his choice. See Brief for Petitioner 28-29. This argument infers too much and explains too little. Although he is correct that a constitutional right *can* be waived by the defendant, see *ibid.*, it does not automatically follow that there is a *right* to dispense with a constitutional right. See *Singer* v. *United States*, 380 U. S. 24, 34-35 (1965). The state can insist upon a procedure even if it is a constitutional right of the defendant, as there is no general right to waive rights. See, *e.g.*, *id.*, at 35 (public trial, vicinage, and confrontation rights do not imply their opposites); *id.*, at 36 (no right to bench trial implied by trial by jury); see also *Santobello* v. *New York*, 404 U. S. 257, 262 (1971) (no right to plead guilty). Although choice has a value in the constitutional scheme, particularly under the First Amendment, see *Faretta*, *supra*, 422 U. S., at 834, n. 45, it is not a constitutional talisman. Just as the State can affect the decision to exercise a right, see *United States* v. *Dunnigan*, 507 U. S. 87, 96 (1993), it can prevent a defendant from waiving certain rights. *Faretta*, tied to the singular importance of the trial, see *supra*, at 5-8, is the exception rather than the rule.

California can restrict a defendant's choice in a way that was not allowed in *Faretta* because of the fundamental difference between trial and appeal. In *Ross*, *supra*, 417 U. S., at 602-603, this Court addressed whether the right to counsel extended to discretionary appeals. Although the discussion does not control this case, *Ross*' due process analysis illustrates

the constitutionally significant difference between the trial and the appeal.

> "By contrast [to the trial], it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the States' prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. *This difference is significant* for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. *McKane* v. *Durston*, 153 U. S. 684 (1894). The fact that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. *Douglas* v. *California*, *supra*. *Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty.* That question is more profitably considered under an equal protection analysis." *Id.*, at 610-611 (emphasis added in part).

This principle is sound without regard to the stage of the appeal. There is no right to confrontation or jury or even to be present on appeal. See *Schwab* v. *Berggren*, *supra*, 143 U. S., at 450. Special protections available at trial are often not extended to the appeal. While due process protects a defendant at trial through the reasonable doubt standard, see *Victor* v. *Nebraska*, 511 U. S. 1, 22 (1994), this protection disappears on appeal. Now it is up to the defendant, with counsel as a sword, to overturn the finding of guilt. See *Ross*, *supra*, 417 U. S., at 610.

Ross does not distinguish between mandatory and discretionary appeals when compared to trials. While personal autonomy may compel the right to stand alone at trial, see

supra, at 7, the appeal, where the defendant seeks to wield a sword rather than a shield, is different. So long as a rough equality is maintained between the rich and poor, see *Douglas*, *supra*, 372 U. S., at 357 (absolute equality not required), the right to counsel on appeal is satisfied. As in *Ross*, this is better examined under equal protection.

2. Equal Protection.

Rough equality between rich and poor is at the heart of the right to counsel on appeal decisions. *Douglas* recognized a right to appellate counsel because "where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Douglas*, *supra*, 372 U. S., at 357 (emphasis in original). Similar principles are found throughout the appellate rights cases. See, *e.g.*, *Ross*, *supra*, 417 U. S., at 611; *Anders* v. *California*, 386 U. S. 738, 745 (1967); *Pennsylvania* v. *Finley*, *supra*, 481 U. S., at 556; *Burns* v. *Ohio*, 360 U. S. 252, 257 (1959); *Griffin* v. *Illinois*, 351 U. S. 12, 19 (1956). The Constitution does not demand absolute equality, but instead "that the state appellate system be 'free of unreasoned distinctions,' *Rinaldi* v. *Yeager*, 384 U. S. 305, 310 (1966), and that indigents have an adequate opportunity to present their claims fairly within the adversary system." *Ross*, 417 U. S., at 612.

An equal protection attack on the California rule must fail because the rule does not disadvantage the indigent defendant. Because self-representation on appeal will almost always be a grave mistake for the indigent defendant, see *supra*, at 5, denying self-representation does not harm a defendant in the context of the right to appellate counsel. The *Griffin-Douglas* line of cases seeks to ensure indigent defendants have adequate access to the courts for the purpose of making the first appeal. See *ibid.* Since counsel will almost always be able to present the appeal better than an unrepresented defendant, see *Evitts* v.

Lucey, *supra*, 469 U. S., at 396,[4] California's rule does not deprive a defendant of his or her access to the courts. When a prisoner has a right to access to the courts, it is the actual access that is important, not the particular means used to achieve this end that matters. See *Lewis* v. *Casey*, 518 U. S. 343, 351 (1996). Because representation by competent counsel is the best way to ensure adequate access to the appellate courts, California should be allowed to limit a defendant to appointed counsel on the first appeal.

The State has a substantial interest in making sure that a defendant's interests are adequately represented on appeal. The state has a higher interest than convicting defendants: seeing that justice is served. Our adversarial system is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question. *Penson* v. *Ohio*, 488 U. S. 75, 84 (1988). This is not possible when the defendant is without counsel on appeal. See *ibid.* Allowing counsel to prosecute the appeal will help ensure that the best arguments are emphasized on appeal, allowing the defendant's case to be seen in the best light, while concentrating scarce judicial resources on the truly relevant issues. See *Jones* v. *Barnes*, 463 U. S. 745, 751-752 (1983). A court that must rely on an unrepresented defendant can expect an onslaught of frivolous issues, prejudicing the meritorious claims by burying them in a flood of worthless ones. Cf. *Brown* v. *Allen*, 344 U. S. 443, 537 (1953) (Jackson, J., concurring in the judgment).

The argument has been raised for extending *Faretta* to the first appeal because wealthy appellants would not be prevented from representing themselves, while indigent appellants must proceed with counsel, even if this is against the individual

4. In addition to much greater competence, counsel also gives defendant some protection from mistakes made on the first appeal. While represented defendants may get relief for ineffective assistance of appellate counsel, see *ibid.*, unrepresented defendants must bear the burden of their own mistakes. *McCaskle* v. *Wiggins*, 465 U. S. 168, 177, n. 8 (1984).

appellant's wishes. See Krikava & Winking, The Right of an Indigent Criminal Defendant to Proceed *Pro Se* on Appeal: By Statute or Constitution, A Necessary Evil, 15 Wm. Mitchell L. Rev. 103, 129 (1989). The disparate treatment based on wealth, this argument runs, would violate the equal protection component of the right to appellate counsel cases. See *id.*, at 131-132.

There is no evidence that California makes this distinction between rich and poor. The defendant has neither shown nor alleged that California would allow a non-indigent defendant to appeal *pro se* instead of hiring counsel. It is likely that courts have not yet confronted this problem. Most defendants in the criminal justice system are indigent at entrance; the number who remain solvent after financing a trial is vanishingly small. Those few with the considerable resources needed to finance their own criminal appeal are unlikely to be foolish enough to represent themselves. "Law addresses itself to actualities." *Griffin*, *supra*, 351 U. S., at 23 (Frankfurter, J., concurring). Until a court actually indulges this hypothetical foolish, wealthy defendant, the problem remains hypothetical, and should not be addressed.

When addressing the equal protection component of the right to appellate counsel "[t]he question is not one of absolutes, but one of degrees." *Ross*, *supra*, 417 U. S., at 612. The Fourteenth Amendment prevents a defendant's indigency from turning the first appeal into a "meaningless ritual" while the better off receive a "meaningful appeal." *Douglas*, *supra*, 372 U. S., at 358. The defendant would invert these principles to force California to turn his appeal into a sham. Because the Court of Appeal protected his access to the courts, its decision did not violate the Constitution.

Of the three reasons given by *Faretta* for its rule—precedent, history, and the structure of the Sixth Amendment—none applies to the appeal. Where the reason for the rule ends, the rule should end. *Lockhart* v. *Fretwell*, 506 U. S. 364, 373 (1993). *Faretta* should end at trial.

III. *Faretta* should not be extended by even a fraction of an inch.

A precedent should be reconsidered and possibly overruled when it has "proven to be intolerable simply in defying practical workability . . . ." *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 854 (1992). On this criterion, *Faretta* v. *California*, 422 U. S. 806 (1975) is on thin ice. Justice Blackmun's misgivings about the litigation-breeding potential of *Faretta*, see *id.*, at 852, have proven all too justified. While unworkability is a reason to reconsider a precedent in an appropriate case, it is an even more powerful reason not to extend a dubious precedent into new territory, "by even a fraction of an inch." Cf. *Silverman* v. *United States*, 365 U. S. 505, 512 (1961).

Faretta has been a headache for the courts. Its ambiguous standard is difficult to administer, giving manipulative defendants opportunities to create reversible error. *Faretta* wastes scarce time and resources. The decision is too often invoked by those least capable of representing themselves. These problems would be exacerbated by an appellate process that is structurally incompatible with self-representation.

The problems with self-representation begin with the type of person who follows this route. Since representing oneself is such a bad choice for the defendant, see *supra*, at 5, there is ample reason to suspect the motives of these defendants. Unfortunately, the *Faretta* rule draws many bad motivations.

> "While it is difficult to pinpoint the exact motivation behind a criminal defendant's request to proceed pro se at trial, a number of themes emerge. Some defendants may proceed pro se to symbolize their lack of respect for any kind of authority, such as that of the courts, or because they are unable to get their way and so represent themselves as an act of defiance. Some pro se defendants have committed such heinous atrocities that life imprisonment or the death penalty is the most likely result.[4] Other criminal defendants

> may be cleverly manipulating the criminal justice system for their own secret agenda when they ask to proceed pro se. Trying to proceed pro se may be the means to a radical political scheme that the defendant wants to advance. On the other hand, while some pro se defendants may not harbor a hidden motive behind the request, they are so totally out of touch with reality that they believe they can do it all themselves.

"[4] These defendants may feel they have nothing to lose by representing themselves. [Citing Charles Manson as an example.]" Decker, The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After *Faretta*, 6 Seton Hall Const. L. J. 483, 485-486 (1996) (footnotes omitted in part).

While self-representation may once have attracted such distinguished individuals such as William Penn, see *Faretta*, *supra*, 422 U. S., at 829, n. 37, some of its current practitioners are more notorious. Those who sought to represent themselves have included serial killers such as Ted Bundy and Douglas Clark, the "Sunset Slayer," see *Bundy* v. *Dugger*, 850 F. 2d 1402, 1412 (CA11 1988); *People* v. *Clark*, 3 Cal. 4th 41, 93, 833 P. 2d 561, 584 (1992), mass murderers including Charles Manson and Colin Ferguson, see *People* v. *Manson*, 61 Cal. App. 3d 102, 172, 132 Cal. Rptr. 265, 306 (1976); Decker, *supra*, 6 Seton Hall Const. L. J., at 486-487, nn. 4, 7, and terrorists such as Sheik Omar Abdel-Rahman, the mastermind of the World Trade Center bombing. See Decker, at 487, n. 6.

Unfortunately, *Faretta* allows such people to represent themselves. The standard for competency to waive counsel is the same as the competency to stand for trial. *Godinez* v. *Moran*, 509 U. S. 389, 398 (1993). The standard is not very

high[5] and does not guarantee that a defendant's self-representation will be adequate to his or her needs. "[A] criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation." *Id.*, at 400 (emphasis in original).

Since those who choose self-representation are usually the least up to the task, *Faretta* frequently leads to farcical trials. Thus Colin Ferguson, who killed six people on a Long Island Railroad commuter train, asserted in his opening statement "that there was a 93-count indictment against him only because the crime occurred in 1993." Decker, *supra*, 6 Seton Hall Const. L. J., at 487, n. 7. Psychiatrists testified at his competency hearing to his "belief in a conspiracy, which included 'a scheme to injure his eyes so that he could not identify the person whom he said carried out the shootings' . . . ." *Id.*, at 522. Ferguson fired his counsel for thinking that he was crazy, see *ibid.*, and the trial court found him competent to stand trial. *Id.*, at 523. The resulting defense was a demeaning, well-publicized spectacle. See *ibid.*; Bonnie, Ferguson Spectacle Demeaned System, National L. J., March 13, 1995, p. A23.

Extending *Faretta* to appeals would compound the problem in cases such as this. The best argument on appeal for a defendant like Ferguson would typically be an attack on the trial court's ruling on competency. Yet a defendant like Ferguson will probably not make that argument, and in the process of deciding whether to permit self-representation on appeal the appellate court would have to make its own factual finding on competency. Appellate courts are not suited to this task, and the integrity of the review process would be threatened by permitting marginally competent appellants to forfeit review of the competency determination.

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5. "[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and assist in preparing his defense may not be subjected to a trial." *Drope* v. *Missouri*, 420 U. S. 162, 171 (1975).

Faretta has an even darker side, a potential loophole for the particularly manipulative defendant. A chilling example of what *Faretta* can do is found in *Clark*, *supra*. Clark stood trial for the murders of two teenage girls and four women, and the attempted murder of another woman. See *Clark*, *supra*, 3 Cal. 4th, at 70-76, 833 P. 2d, at 570-573. Clark, represented by Maxwell Keith as lead counsel and Penelope Watson as assistant, see *id.*, at 89-90, 833 P. 2d, at 581-582, first expressed a desire to represent himself after a defense discovery motion was partially denied. See *id.*, at 90, 833 P. 2d, at 582. On the day before the trial, he made a *Faretta* motion along with a motion to have Watson assist him. The trial court denied the motion as untimely, not wanting to disrupt an estimated six-month, hundred witness trial. See *id.*, at 90-92, 833 P. 2d, at 582-583. After repeated requests by Clark, the trial court granted his *Faretta* motion on the fifth day of trial, after carefully informing defendant of his rights. See *id.*, at 93, 833 P. 2d, at 584.

Clark then stated "that he did not want to be his own attorney but was 'forced' to because 'It's my life and to proceed with Mr. Keith as my attorney . . . is suicide.' " *Ibid.* Clark then started to make personal attacks against Keith, which the trial court dismissed as " 'so outrageous they don't warrant an answer from the court.' " *Ibid.* The trial court ordered Keith and Watson to remain as standby counsel. One week later, after the trial court did not grant all of his requests, Clark stated he had resigned his *pro per* status, as the court would not let him prepare the case as he wished. *Id.*, at 94, 833 P. 2d, at 585. When asked whether he was giving up his right to represent himself, Clark "stated 'emphatically' that he wanted to retain his *pro per* status" but that he wanted the court to grant his various requests. *Ibid.* When he did not get his way in further rulings, Clark "declared that the defense 'stands mute for the rest of the trial.' " *Ibid.* The trial court found that Clark had waived his *Faretta* rights, and reappointed Keith and Watson. *Id.*, at 94-95, 833 P. 2d, at 585. Later that afternoon, as Keith began cross-examining a witness, Clark told the jury that Keith

did not represent him. *Id.*, at 95, 833 P. 2d, at 585. Keith continued the defense for the rest of the day.

The next day Clark asked to have his *pro per* privileges reinstated. The trial court assented, keeping Keith and Watson as standby. *Ibid.* At the close of the People's case, defendant moved to dismiss all counts because the court had interfered with his *pro per* rights after he stood mute. The trial court denied the motion, warning Clark that any more misconduct would lead to counsel being reappointed. *Ibid.* Clark continued to fight the court over his motions, leading the court to withdraw *pro per* privileges permanently on December 8, 1982, after defendant became abusive. *Id.*, at 96, 833 P. 2d, at 586.

Although the California Supreme Court found no *Faretta* error, see *id.*, at 96-97, 833 P. 2d, at 586, Clark did convince one Justice to find *Faretta* error for appointing counsel after defendant chose to stand mute. See *id.*, at 175, 833 P. 2d, at 639 (Kennard, J., dissenting). Justice Mosk found the opposite "error," believing that capital defendants should be denied self-representation whenever they lack the "knowledge and abilities . . . to effectively duel with the skilled prosecutor," *id.*, at 174, 833 P. 2d, at 638, which could be nearly always.

The *Clark* case is rendered even darker by the fact that Clark may have intended to use his *Faretta* rights to *create* error. In a letter to another inmate, Clark "boasted that he had 'gone "Pro per" at least 3 times' and had the case so fraught with controversial Judge's rulings it will be an appeals court NIGHTMARE, should it ever get so far.' " *Id.*, at 88, n. 3, 833 P. 2d, at 581, n. 3 (emphasis added).

Unfortunately, there is some possibility that he succeeded. A requirement to honor a defendant's decision to stand mute has been cited in dicta by several federal courts. See *United States* v. *McDowell*, 814 F. 2d 245, 250 (CA6 1987); *United States* v. *Clark*, 943 F. 2d 775, 782 (CA7 1991); *Savage* v. *Estelle*, 924 F. 2d 1459, 1464, n. 10 (CA9 1990). *Faretta* only mentions terminating the self-representation rights of a defendant "who deliberately engages in serious and obstructionist misconduct." *Faretta*, *supra*, 422 U. S., at 834, n. 46. It is difficult to characterize silence as obstruction. See *Clark*, *supra*, 3 Cal. 4th, at 177, 833 P. 2d, at 640 (Kennard, J., dissenting).[6] Under *Faretta*, the Constitution arguably requires letting a defendant like Clark stand mute, which, as Justice Mosk notes, would be a travesty in a capital case.

Faretta's attractive nuisance must be kept out of the appeal. Appellate defendants will attempt to manipulate the system by asking to represent themselves at the last minute, or changing their minds throughout the course of the appeal. Clark himself tried to continue his manipulative ways during the appeal. See *id.*, at 97, n. 5, 833 P. 2d, at 586, n. 5. Although the California Supreme Court rebuffed Clark, other courts may have less fortitude, other defendants may be more subtle, and the creation of a constitutional rule on this point would create yet another ground for attacking state judgments on federal habeas.

Trial courts indulge defendants like Clark because *Faretta* standards for regulating self-representation are so vague, limited to terminating the right for deliberately obstructive and serious misconduct. *Faretta*, *supra*, 422 U. S., at 834-835, n. 46. *Faretta* does not define the proper timing of the motion, whether a withdrawal is conclusive, or how a defendant may waive his *Faretta* rights. See *id.*, at 852 (Blackmun, J., dissenting). Since *Faretta* error is "not amenable to 'harmless error' analysis," *McCaskle* v. *Wiggins*, 465 U. S. 168, 177, n. 8 (1984), any court confronted with a *Faretta* motion must walk on eggs.

The problems with *Faretta* on appeal would be particularly severe in capital cases. Although "*Faretta* error" on appeal would not free a defendant, it would delay the execution of the

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6. There is also conflict on the timing of the *Faretta* motion. The trial court's decision to deny the motion on the day of the trial might be error in the Ninth Circuit. See *Fritz* v. *Spalding*, 682 F. 2d 782, 783-784 (1982).

death sentence for many years. Since delay is a victory for defendants in capital cases, extending *Faretta* to appeal would create a powerful incentive for defendants to manipulate the system.

Extending *Faretta* to appeal also raises the possibility of prisoners participating in oral argument before appellate courts. Although this Court held that prisoners have no right to participate in oral argument in *Price* v. *Johnston*, 334 U. S. 266, 284-285 (1948), extending *Faretta* would endanger this precedent. A wealthy, self-represented defendant who can post bail pending appeal would be able to appear before the court to engage in oral argument, while the indigent defendant who cannot afford bail will not be able to attend, strictly due to poverty. Unequal access to the courts based on wealth is a textbook violation of the *Douglas-Griffin* line of cases. See *Douglas* v. *California*, 372 U. S. 353, 357-358 (1963).

Giving prisoners the right to engage in oral argument would present major practical difficulties. The relatively sedate appellate courts would have to beef up their security to the level of the trial courts in order to deal with these potentially volatile litigants. For example, in *United States* v. *Jennings*, 855 F. Supp. 1427, 1432-1433 (MD Pa. 1994), after the defendant's motion to substitute counsel was denied, he struck his attorney on the side of the head with his fist, and six marshals had to restrain him. The next day, Jennings threatened physical harm to the prosecutor, corrections officers, and former defense counsel, including cutting counsel's throat and "drink[ing] his blood." Extending *Faretta* to appeal would force appellate courts to protect themselves from litigants like Jennings, something they are not used to doing.

Even if the heightened security requirements do not waste too many scarce judicial resources, a right to oral argument would create a powerful incentive for prisoners to represent themselves. The temporary freedom associated with oral argument would induce many prisoners to represent themselves in order to get a small taste of freedom. Although this tempo-

rary freedom is likely to sacrifice any prospect of reversing the conviction, impulse control is typically in short supply in the prison population.

The alternative would be to deny all *pro se* appellants oral argument, but that rule would further impair the integrity of the review process. On top of inadequate briefs to be expected from *pro se* appellants, courts would be denied the clarifications that sometimes come from oral argument.

In an era of perpetually scarce judicial resources, the appellate courts act as a particularly severe bottleneck. There are limits on the size and number of appellate courts that do not exist for their trial counterparts. See N. Komesar, Imperfect Alternatives 144-145 (1994). Therefore, "the main bottleneck [to the capacity of the judiciary] is the appellate court structure." *Id.*, at 144. Extending *Faretta* to appeals would increase the strain on a perpetually over-burdened appellate system. Scarce judicial resources would be wasted on increased security, dealing with obstreperous and manipulative litigants, and reading worthless briefs for the purpose of giving a defendant the right to appellate self-immolation.

The most troublesome areas of criminal procedure are those in which a court or a legislature must navigate a narrow, unmarked, treacherous passage between opposing Scylla-and-Charybdis rights. The "tension" between the Eighth Amendment's twin requirements in capital cases of channelled discretion and individualized sentencing, see *Tuilaepa* v. *California*, 512 U. S. 967, 973 (1994), is one example. A state which strives to appropriately channel discretion will surely be attacked for insufficient individualization, and vice versa. *Faretta* is another example. When a defendant of doubtful competency makes a *Faretta* motion, the trial judge must plunge into the fog of mental health and determine whether he has the capacity to waive his right to counsel. On appeal and habeas, the court will surely be accused of violating the Constitution regardless of which way it rules. Compare *Godinez* v. *Moran*, 509 U. S. 389, 393-394 (1993) (Ninth

Circuit granted habeas relief because state court granted *Faretta* motion), with *Moore* v. *Calderon*, 108 F. 3d 261, 265 (CA9 1997) (Ninth Circuit granted habeas relief because state court denied *Faretta* motion). The last thing America's courts need is yet another pair of opposing rights which manipulative defendants can use to create more grounds for reversal. Creation of such a dilemma would require an exceptionally compelling justification, and none exists here.

CONCLUSION

The decision of the California Supreme Court denying a writ of mandate should be affirmed.

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Respectfully submitted,

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